84-1645

Office - Supreme Court, U.S.
FILED
APR 19 1985
ALEXANDER L. STEVAS
CLERK

No. ____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Respondent,

—against—

SOLOMON WEISS,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LEON SILVERMAN, P.C.
Attorney of Record
One New York Plaza
New York, New York 10004
(212) 820-8000

Of Counsel:

GREGORY P. JOSEPH
BONNIE KAYATTA-STEINGART
DALE M. CENDALI
FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON

Attorneys for Petitioner

43pp

QUESTIONS PRESENTED

1. Whether the Fifth Amendment right to be tried only on indictment by a grand jury permits a court to sustain a mail fraud conviction, even though the fraudulent scheme proved by the government at trial is not the scheme set out in the indictment, because the court determines that the defendant did not suffer "substantial prejudice in his trial preparations" as a result of the post-indictment shift in prosecutorial theory.

2. Whether an employee's participation in the creation of an undisclosed corporate cash fund at the direction of the chief executive officers of the corporation, in the absence of any personal gain to the employee or misuse of the proceeds or intended or actual harm to the corporation, violates the mail fraud statute.

3. Whether a criminal jury's resort to extra-record evidence to assist it in its deliberations, in violation of the defendant's Fifth and Sixth Amendment rights, (a) is presumptively prejudicial to the defendant; (b) must affirmatively be shown by the government to have been harmless beyond a reasonable doubt; and (c) in the absence of such a showing, may be countenanced—notwithstanding the direct testimony of the jurors as to their actual need for, and reliance on, the extra-record evidence—because the trial judge satisfies herself that the record evidence would have been sufficient to support a conviction.

4. Whether, in a perjury prosecution, the Due Process Clause of the Fifth Amendment requires that the issue of materiality—an essential element of the offense—be determined by the jury rather than the court.

TABLE OF CONTENTS

	PAGE
Table of Authorities	iv
Opinions Below	x
Jurisdiction	x
Constitutional and Statutory Provisions	x
Statement	1
Reasons for Granting the Writ	5
Constructive Amendment of the Indictment	5
Mail Fraud	16
Jury Misconduct in Procuring Extra-Record Evidence	20
Materiality of Perjury as a Jury Issue	27
Conclusion	30

APPENDIX INDEX

	PAGE APP.
OPINIONS	
Denial of Rehearing En Banc	1
Panel Opinion of the United States Court of Appeals for the Second Circuit in *United States v. Weiss*, No. 84-1103 (January 7, 1985)	2
Opinion of the United States District Court for the Southern District of New York in *United States v. Weiss*, 81 Cr. 636 (MJL)	38

PAGE APP.

INDICTMENT 76

TRANSCRIPTS

Excerpt from the Government's opening statement, November 3, 1982..... 91

Excerpt from cross-examination of Leonard Horwitz, November 4, 1982..... 99

Excerpt from cross-examination of Jay Emmett, November 10, 1982 101

Excerpt from trial transcript, November 15, 1982 104

Excerpt from direct examination of Solomon Weiss, November 17, 1982 106

Excerpt from Government's closing statement, November 22, 1982 108

Excerpt from the Court's charge to the jury, November 23, 1982..... 116

Excerpt from trial transcript, November 24, 1982 117

Excerpt from trial transcript, November 26, 1982 124

Excerpt from trial transcript, November 27, 1982 128

Excerpt from post-trial hearing, February 23, 1983 133

Hearing regarding jury's use of extra-record evidence, May 25, 1983 136

Court's Exhibit Y 184

TABLE OF AUTHORITIES

Cases:	PAGE
American Distilling Co. v. Wisconsin Liquor Co., 104 F.2d 582 (7th Cir. 1939)	10, 11
Bloom v. Illinois, 391 U.S. 194 (1968)	28n
Chapman v. California, 386 U.S. 18 (1967)	23
Commonwealth v. McDuffee, 379 Mass. 353, 398 N.E.2d 463 (1979)	27
Cox v. State, 13 Ga. App. 687, 79 S.E. 909 (1913)	27
D'Oench, Duhme & Co. Inc. v. Federal Deposit Insurance Corp., 315 U.S. 447 (1942)	16
Donnelly v. United States, 276 U.S. 505 (1928)	16
Ex parte Bain, 121 U.S. 1 (1886)	5
Fontaine v. California, 390 U.S. 593 (1968)	23
Gaither v. United States, 413 F.2d 1061 (D.C. Cir. 1969)	8
Gibson v. Clanon, 633 F.2d 851 (9th Cir.), *cert. denied*, 454 U.S. 1035 (1981)	25
Government of Virgin Islands v. Joseph, 685 F.2d 857 (3d Cir. 1982)	22
Hale v. Henkel, 201 U.S. 43 (1906)	13n
Harrington v. California, 395 U.S. 250 (1969)	23
Heisler v. United States, 394 F.2d 692 (9th Cir.), *cert. denied*, 393 U.S. 986 (1968)	7
Hobson v. Wilson, 737 F.2d 1 (D.C. Cir. 1984), *cert. denied*, 53 U.S.L.W. 3687 (1985)	23
Horning v. District of Columbia, 254 U.S. 135 (1920)	28

PAGE

Huddleston v. Herman & MacLean, 640 F.2d 534 (5th Cir. 1981), *aff'd in part, rev'd in part*, 459 U.S. 375 (1983) 28n

In re Winship, 397 U.S. 358 (1970) 27

Interstate Commerce Commission v. Brimson, 154 U.S. 447 (1894) 28

Moore v. Illinois, 434 U.S. 220 (1977) 23

Morissette v. United States, 342 U.S. 246 (1952)..... 27

Mullaney v. Wilbur, 421 U.S. 684 (1975) 27

Ohio v. Roberts, 448 U.S. 56 (1980) 24

Owen v. Duckworth, 727 F.2d 643 (7th Cir. 1984) 22

Parker v. Gladden, 385 U.S. 363 (1966) 23, 24n

Patterson v. Colorado, 205 U.S. 454 (1907)..... 23

Paz v. United States, 462 F.2d 740 (5th Cir. 1972) 25

People v. Adams, 86 Misc.2d 634, 382 N.Y.S.2d 879 (1976) 11

People v. Clemente, 285 App. Div. 258, 136 N.Y.S. 2d 202 (1st Dep't 1954), *aff'd*, 309 N.Y. 890, 131 N.E.2d 294 (1955)..... 27

Remmer v. United States, 347 U.S. 227 (1954) 20-21

Rinker v. County of Napa, 724 F.2d 1352 (9th Cir. 1983)..... 22

Russell v. United States, 369 U.S. 749 (1962) 12-13, 13n, 13-14, 15

Sandstrom v. Montana, 442 U.S. 510 (1979)..... 27

Sinclair v. United States, 279 U.S. 263 (1929)..... 27-28

Smith v. Phillips, 455 U.S. 209 (1982) 20, 21

State v. Asherman, 193 Conn. 695, 478 A.2d 227 (1984), *cert. denied*, 53 U.S.L.W. 3668 (1985)..... 22

PAGE

State v. Blackwell, 664 S.W.2d 686 (Tenn. 1984)..... 23

State v. King, 10 Ohio App.3d 161, 460 N.E.2d 1383 (1983)..... 23

State v. Poh, 116 Wis.2d 510, 343 N.W.2d 108 (1984).. 22

Stirone v. United States, 361 U.S. 212 (1960).....5, 6, 10, 15

TSC Industries, Inc. v. Northway, Inc., 426 U.S. 438 (1976)..... 28n

Turner v. Louisiana, 379 U.S. 466 (1965)..... 23-24

United States v. Barnes, 747 F.2d 246 (4th Cir. 1984).....22, 26-27

United States v. Bizzard, 615 F.2d 1080 (5th Cir. 1980), *cert. denied*, 459 U.S. 973 (1982)..... 8

United States v. Bronston, 658 F.2d 920 (2d Cir. 1981), *cert. denied*, 456 U. S. 915 (1982)..... 17

United States v. Bryza, 522 F.2d 414 (7th Cir. 1975), *cert. denied*, 426 U.S. 912 (1976)..... 17

United States v. Cina, 699 F.2d 853 (7th Cir.), *cert. denied*, 104 S.Ct. 481 (1983)..... 7

United States v. Cirami, 510 F.2d 69 (2d Cir.), *cert. denied*, 421 U.S. 964 (1975)..... 7

United States v. Crocker, 568 F.2d 1049 (3d Cir. 1977)..... 8

United States v. Cusmano, 659 F.2d 714 (6th Cir. 1981)..... 8

United States v. Dawson, 516 F.2d 796 (9th Cir.), *cert. denied*, 423 U.S. 855 (1975)..... 7

United States v. DeLutis, 722 F.2d 902 (1st Cir. 1983).. 22

United States v. Delaney, 732 F.2d 639 (8th Cir. 1984).. 22

United States v. Eaton, 144 U.S. 677 (1892)..... 16

PAGE

United States v. Figueroa, 666 F.2d 1375 (11th Cir. 1982) 8

United States v. Galiffa, 734 F.2d 306 (7th Cir. 1984) .. 8

United States v. Griffin, 463 F.2d 177 (10th Cir.), *cert. denied*, 409 U.S. 988 (1972) 8

United States v. Hausmann, 711 F.2d 615 (5th Cir. 1983) 28n

United States v. Hess, 124 U.S. 483 (1888) 13n

United States v. Hudson & Goodwin, 7 Cranch 32 (1812) 16

United States v. Iozzi, 420 F.2d 512 (4th Cir. 1970), *cert. denied*, 420 U.S. 943 (1971) 8

United States v. Irwin, 654 F.2d 671 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982) 28n

United States v. Issacs, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) 17

United States v. Kelly, 722 F.2d 873 (1st Cir. 1983), *cert. denied*, 104 S.Ct. 1425 (1984) 7-8

United States v. Littlefield, 752 F.2d 1429 (9th Cir. 1985) 22

United States v. Margiotta, 688 F.2d 108 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983) 17, 20

United States v. Miller, 53 U.S.L.W. 4446 (U.S. April 1, 1985) 5, 6, 10, 14, 15

United States v. Null, 415 F.2d 1178 (4th Cir. 1969).... 28

United States v. Paladin, 539 F.Supp. 100 (W.D.N.Y. 1982) 11

United States v. Pazsint, 703 F.2d 420 (9th Cir. 1983) .. 8

United States v. Pennell, 737 F.2d 521 (6th Cir. 1984) *cert. denied*, 105 S.Ct. 906 (1985) 21-22

United States v. Siegel, 717 F.2d 9 (2d Cir. 1983) 18, 19

PAGE

United States v. United States Gypsum Co., 438 U.S. 422 (1978) 27

United States v. Valdez, 594 F.2d 725 (9th Cir. 1979) ... 28n

United States v. Yeo, 739 F.2d 385 (8th Cir. 1984) 8

Wood v. Georgia, 370 U.S. 375 (1962) 13

Constitution and Statutes:

U.S. Const. Amend. V 5, 8, 15, 23, 24, 25

U.S. Const. Amend. VI 23, 24, 25

Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977) 18n

18 U.S.C § 1341 ..... ix, 1

18 U.S.C. § 1623 .....x, 1, 27

18 U.S.C. § 1962(c) ..... ix, 1

26 U.S.C. § 7206 1

N.Y. Penal Law § 180.00 10

N.Y. Penal Law § 180.03 10

N.Y. Penal Law § 180.05 10

Legislative History:

Senate Comm. on Banking, Housing and Urban Affairs, *Foreign Corrupt Practices and Domestic and Foreign Investment Improved Disclosure Acts of 1977*, S. Rep. No. 114, 95th Cong., 1st Sess. (1977) 18n

Law Reviews:

McClintock, *Indictment by Grand Jury*, 26 Minn. L. Rev. 153 (1942) 13n

Note, *The Grand Jury as an Investigatory Body*, 74 Harv. L. Rev. 590 (1961) 13n

PAGE

Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L. J. 1149 (1960) 13n

Books:

1 W. Holdsworth, HISTORY OF ENGLISH LAW (1927) ... 13n

J. Noonan, BRIBES (1985) 11

R. Younger, THE PEOPLE'S PANEL (1963) 13n

OPINIONS BELOW

The opinion of the court of appeals (App. 2-37) is reported at 752 F.2d 777 (2d Cir. 1985). On February 20, 1985, the court of appeals denied petitioner's request for a rehearing and his suggestion that rehearing be *en banc*. (App. 1.) The district court's opinion is reported at 579 F. Supp. 1224 (S.D.N.Y. 1983). (App. 38-75.)

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1985. (App. 2.) On February 20, 1985, that court denied petitioner's request for rehearing and suggestion that rehearing be *en banc*. (App. 1.) The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Grand Jury Clause of the Fifth Amendment provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury. . . .

U.S. Const. Amend. V.

2. The Sixth Amendment provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for ob-

taining witnesses in his favor, and to have the Assistance of Counsel for his defense.

U.S. Const. Amend. VI.

3. The mail fraud statute, 18 U.S.C. 1341, provides:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

4. The Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1962, provides:

> § *1961. Definitions.*
>
> As used in this chapter—
>
> (1) "racketeering activity" means . . . (B) any act which is indictable under any of the following provisions of title 18, United States Code: . . . section 1341 (relating to mail fraud) . . .;
>
> * * *
>
> (5) "pattern of racketeering activity" requires at least two acts of racketeering activity, one of which occurred

after the effective date of this chapter and the last of which occurred within ten years (excluding any period of imprisonment) after the commission of a prior act of racketeering activity. . . .

§ *1962. Prohibited activities.*

(c) It shall be unlawful for any person employed by or associated with any enterprise engaged in, or the activities of which affect, interstate or foreign commerce, to conduct or participate, directly or indirectly, in the conduct of such enterprise's affairs through a pattern of racketeering activity or collection of unlawful debt.

5. The pertinent perjury statute, 18 U.S.C. § 1623, provides:

(a) Whoever under oath (or in any declaration, certificate, verification, or statement under penalty of perjury as permitted under section 1746 of title 28, United States Code) in any proceeding before or ancillary to any court or grand jury of the United States knowingly makes any false material declaration or makes or uses any other information, including any book, paper, document, record, recording, or other material, knowing the same to contain any false material declaration, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

STATEMENT

Following a jury trial, Solomon Weiss was convicted on seven counts of a thirteen-count indictment. He was convicted of one violation of the Racketeer Influenced and Corrupt Organizations Act, 18 U.S.C. § 1962(c) (Count 1); three violations of the mail fraud statute, 18 U.S.C. § 1341 (Counts 2-4); and three perjury violations. 18 U.S.C. § 1623 (Counts 6-8). He was acquitted of one count of mail fraud (Count 5); one count of perjury (Count 9); and four counts of tax fraud, 26 U.S.C. § 7206(2) (Counts 10-13).[1] The mail fraud convictions were the only predicate acts underlying the RICO conviction.

The indictment charging Mr. Weiss was returned on September 16, 1981. A superseding indictment was handed up shortly before trial commenced in November 1982. Mr. Weiss was charged in the indictment with a fraudulent scheme whose sole objects were to: (a) "secretly and corruptly extract and accept cash bribes in return for . . . caus[ing] Warner [Communications, Inc. (Warner)] to purchase common stock in the Westchester Premier Theatre [(WPT)]" (App. 79; Count 1, ¶ 4), and (b) "secretly and corruptly siphon and convert approximately $221,950 in checks which belonged to Warner and its shareholders" (App. 79-80; Count 1, ¶¶ 5, 6; *see also id.* at ¶ 7(c)).

The indictment charged that this conduct constituted a "scheme and artifice to defraud Warner and its shareholders [by] obtaining money from Warner and its shareholders by means of false and fraudulent pretenses" (App. 77, 82; Count 1, ¶ 3; Counts 2-5, ¶ 2) and a breach by Mr. Weiss of "fiduciary duties to Warner and its shareholders to provide

---

1 At sentencing on March 13, 1984, the district court fined Mr. Weiss a total of $58,000, suspended imposition of sentence on all counts and placed Mr. Weiss on probation for five years conditioned upon his performing community service with the Essex County, New Jersey, Division of Youth Services on a full-time basis for the duration of his five-year probation. Mr. Weiss was also ordered to forfeit 14,898 shares of Warner Communications, Inc. ("Warner") stock and 359 Warner warrants, which together were worth approximately $411,939 on the date they were ordered forfeit.

honest and faithful services, undivided loyalty and to perform [his] executive obligations in good faith and exclusively in the best financial interests of Warner and its shareholders" (App. 79; Count 1, ¶ 5, 6; *see also id.* at ¶ 4).

At trial, however, the government did not argue or attempt to prove that Mr. Weiss personally accepted cash bribes or converted and siphoned Warner checks in return for causing Warner to buy WPT stock. On the contrary, the government shunned the theory that Mr. Weiss retained any of the proceeds generated by the alleged scheme (App. 99, 102). The prosecution's case was, instead, that Mr. Weiss was directed by his corporate superiors to accept cash on Warner's behalf in exchange for (i) purchasing WPT stock and (ii) issuing checks for services not actually rendered, in order to create a corporate cash fund for Warner (App. 91, 93-98, 108-110, 114-115).

The government offered no evidence as to the disposition of the proceeds of the Warner cash fund nor did it attempt to identify any of the uses to which the cash was put. The prosecutor conceded that the proceeds did not go to Mr. Weiss personally and that that they were presumptively used for the corporate benefit of Warner. (App. 133-135)[2]

The jury was instructed that it could convict Mr. Weiss of the mail fraud and RICO charges only if it found that he knowingly participated in the creation of a cash fund. The district judge stated, in her charge: "[T]he government contends that the fraudulent scheme was the creation of a cash fund at

---

2 The prosecution's main witnesses against Mr. Weiss, in the grand jury and at trial, were former Warner Executive Vice President Jay Emmett and Emmett's close friend, Leonard Horwitz, once a WPT vice president and later a Warner executive. Both were convicted of felonies arising out of WPT-related prosecutions and both agreed to cooperate with the government, their sentences to be imposed following their cooperation. As part of his cooperation agreement, Emmett was permitted to avoid RICO forfeiture of $7 million worth of Warner stock which he owned. Mr. Weiss took the stand in his own defense and denied participation in any scheme. He testified that he acted on orders from Emmett, his corporate superior, with respect to specific conduct that he did not dispute. (App. 106-107.)

Warner." (App. 33; 752 F.2d at 793.) She did not charge the jury that Mr. Weiss's guilt turned on whether he had exacted bribes or converted corporate funds. Rather, she instructed that he could not be convicted on the mail fraud and RICO counts if "the government has not proven beyond a reasonable doubt that the cash fund alleged in the indictment[3] existed" because "then the government will not have proven that essential element of the crime of mail fraud." (*Ibid.*)

The jury deliberated for twenty-six hours over four days. At the end of the second day of deliberations, the jury informed the court that it was deadlocked, but the court directed that deliberations be resumed. (App. 122-123.) The verdict was returned on day five.

Throughout the deliberations, the jurors focused on determining what, in their view, Mr. Weiss knew or should have known of critical events at material times. Because the mountainous paper record before them was largely undisputed, the major issue became whether Mr. Weiss possessed the requisite "guilty knowledge". To the jurors, as disclosed in a post-trial inquiry conducted by the trial judge:

> One of the *key aspects* of deciding whether or not Mr. Weiss was guilty rested on the argument of whether or not one can reasonably expect him to know certain kinds of things.

(App. 156. *See also* App. 157, 184)

Central to the jurors' discussion was what inference, if any, could be drawn from Mr. Weiss's training as a certified public accountant ("CPA"), even though he had not practiced public accounting for over twenty years. (App. 153, 156-157, 160, 170, 184.) The problem that the jurors faced was that they were almost entirely "unfamiliar with the nature of the training of a CPA." (App. 64, 126-127, 170, 175, 191.)

At some point during the deliberations—precisely when is uncertain—one juror undertook independent research into the functions and responsibilities of certified public accountants.

---

3 "Of course," as the dissent below noted, "the cash fund was nowhere alleged in the indictment." (App. 33; 752 F.2d at 793.)

(App. 149, 157, 184.) Specifically, he turned to a standard accounting text, in which he read detailed and glowing descriptions of the astuteness and professionalism with which independent CPAs perform complex auditing and other services. (App. 184-186.) He then proceeded to read or summarize to the other jurors excerpts from the textbook which purported to state the functions and responsibilities of CPAs. (App. 149-150, 153, 157, 160, 173, 184-186.)

On the third day of deliberations, the jurors addressed to the Court a question concerning CPAs which closely tracked, and cryptically cited, the textbook excerpt which had been read to them.[4] The note expressed the jurors' concern about, and effort to figure out, "basically what were the duties of a CPA." (App. 170.) The District Judge informed the jury that the record contained no evidence "as to what a CPA is" and directed them not to speculate on the subject. (App. 127.)

The jurors concluded from the Court's response that they were not going to receive any more information concerning CPAs. (App. 160.) However, "[t]he argument among jurors . . . conti[n]ued to the end of the deliberations." (App. 160, 184.) The jury returned its verdict convicting Mr. Weiss on seven of thirteen counts on the following day. (App. 131.)

---

4 Their note conveying the question provided:

> "This jury has been directed to use its best unbiased judgement [*sic*] and common sense to reach a verdict on a series of counts outlined to us. Our ability to do this fairly is dependent upon our varied, collective experiences. Most of us are unfamiliar with the nature of the training of a CPA. Mr. Weiss is a CPA.
>
> "Q. Is this jury entitled to know what a CPA is, as opposed to a bookkeeper.
>
> lawyer v. legal aid[e]
>
> M.D. v. paramedic
>
> dentist v. dental tech
>
> "Re underlined (xerox) sentences. Meigs and Meigs."

Court Exh. Y (the "note") (App. 191). Although unknown to the court and counsel at the time the note was received, subsequently it was developed that "Meigs and Meigs" were the authors of the accounting textbook which the jurors consulted.

REASONS FOR GRANTING THE WRIT

Review should be granted for four reasons: *first*, to resolve serious uncertainty and conflicts among the courts of appeals concerning the substance and application of the constructive amendment doctrine under the Grand Jury Clause of the Fifth Amendment; *second*, to illuminate the parameters of the federal law of fiduciary duty as encompassed by the mail fraud statute and thereby to define the common law reach of this facially limitless criminal statute; *third*, to resolve conflicting decisions among the courts of appeals and state courts of last resort concerning the assignment and quantum of the burden of proof with respect to the harm to the defendant caused by a criminal jury's resort to extra-record evidence; and, *fourth*, to decide whether materiality, an essential element of the crime of perjury, is constitutionally required to be determined by the jury under the reasonable doubt standard.

Constructive Amendment of Indictment

1. In a series of decisions recently reaffirmed in *United States v. Miller*, 53 U.S.L.W. 4446 (U.S. April 1, 1985), this Court has repeatedly held that the exclusive test for determining whether an indictment has been constructively amended, in derogation of the Grand Jury Clause of the Fifth Amendment, is whether the defendant has been convicted of an offense whose elements "are fully and clearly set out in the indictment." *Miller*, 53 U.S.L.W. at 4447 (citations omitted). *See also id.* at 4448, 4449, 4450 (citing and quoting, *inter alia, Stirone v. United States*, 361 U.S. 212, 217 (1960), and *Ex parte Bain*, 121 U.S. 1, 10 (1886)).

Under this test, to determine whether an indictment has been constructively amended, the prosecution's trial theory and proof are juxtaposed and compared with the indictment. "[A] conviction cannot stand if based on an offense that is different from that alleged in the grand jury's indictment." *Miller*, 53 U.S.L.W. at 4449 (reaffirming in pertinent part *Bain*).

A judicial appraisal as to whether the defendant was in some factual sense "substantial[ly] prejudice[d] in his trial preparations" by a prosecutor's post-indictment change of theory forms no part of this analysis. Whether a constructive amendment occurred is determined solely by reference to the face of the indictment. If it has occurred, "prejudice" is established as a matter of law. Deprivation of "the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury . . . is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Miller*, 53 U.S.L.W. at 4448-4449, *quoting with approval, Stirone*, 361 U.S. at 217.

2. The majority decision of the court of appeals did not neutrally apply the foregoing principles. On the contrary, the majority expressly declined to do so, emphasizing its predisposition against finding any variation between the indictment and the prosecution's trial theory or proof to be a constructive amendment, absent proof of "substantial prejudice" to the defendant in preparing for trial.

> *This circuit has been reluctant to construe an alleged "shift" in the government's theory or proof as a constructive amendment* that would require reversal of a conviction "without regard to whether defendant was prejudiced by a difference between the indictment and the proof." United States v. Heimann, 705 F.2d 662, 665-66 (2d Cir. 1983). See United States v. Sindona, 636 F.2d 792 (2d Cir. 1980), cert. denied, 451 U.S. 912, 101 S.Ct. 1984, 68 L.Ed.2d 302 (1981). Rather, *this circuit has treated any differences between the indictment and the proof as variances which do not require reversal absent a showing that the variance caused substantial prejudice to the defendant*. See United States v. Knuckles, 581 F.2d 305, 312 (2d Cir.), cert. denied, 439 U.S. 986, 99 S.Ct. 581, 58 L.Ed.2d 659 (1978); Sindona, 636 F.2d at 798.

App. 26; 752 F.2d at 790 (emphasis added).

Satisfied that Mr. Weiss received "adequate notice" of the government's post-indictment change in theory, and that he

did not, as a result, suffer "substantial prejudice in his trial preparations" (App. 27; 752 F.2d at 790), the majority undertook to shoehorn the government's trial theory into the intractable fit of the indictment's language. It therefore proceeded to affirm Mr. Weiss's conviction of mail fraud, and thus RICO, for involvement in a scheme not alleged in the indictment—indeed, "the very nature of [which] . . . is significantly different from the crime charged in the indictment" (App. 33; 752 F.2d at 793) (Newman, J., dissenting).

3. The majority predicated its affirmance on a widely employed but untenable dichotomy between a "constructive amendment" of, and a mere "variance" from, an indictment. The court acknowledged that "[t]here is considerable confusion as to what constitutes a constructive amendment of an indictment as opposed to a variance of an indictment." (App. 19; 752 F.2d at 787.) This confusion has frequently been noted by the courts of appeals. *See, e.g., United States v. Cina*, 699 F.2d 853, 857-858 (7th Cir.), *cert. denied*, 104 S.Ct. 481 (1983); *United States v. Dawson*, 516 F.2d 796, 801-804, *cert. denied*, 423 U.S. 855 (1975); *United States v. Cirami*, 510 F.2d 69, 72 (2d Cir.), *cert. denied*, 421 U.S. 964 (1975); *Heisler v. United States*, 394 F.2d 692, 695-696 (9th Cir.), *cert. denied*, 393 U.S. 986 (1968) ("the progeny of *Bain* are out of joint").

4. Review is appropriate on this issue for four reasons. *First*, the majority's avowed reluctance to apply the constructive amendment doctrine and its insistence upon incorporating a "substantial prejudice" standard conflicts with the holdings of this Court in the *Miller*, *Stirone* and *Bain* cases. This conflict is not an isolated occurrence but symptomatic of a long line of Second Circuit cases (cited in the majority opinion) declining to apply the analysis of this Court most recently reaffirmed in *Miller*.

Second, the majority's insistence on employing the Second Circuit's "substantial prejudice" test is also in conflict with the uniform rule of decision in other circuits, which without exception apply the constructive amendment doctrine without regard to alleged prejudice. *See, e.g., United States v. Kelly*,

722 F.2d 873 (1st Cir. 1983), *cert. denied*, 104 S.Ct. 1425 (1984); *United States v. Crocker*, 568 F.2d 1049 (3d Cir. 1977); *United States v. Iozzi*, 420 F.2d 512 (4th Cir. 1970), *cert. denied*, 402 U.S. 943 (1971); *United States v. Bizzard*, 615 F.2d 1080 (5th Cir. 1980), *cert. denied*, 459 U.S. 973 (1982); *United States v. Cusmano*, 659 F.2d 714 (6th Cir. 1981), *cert. denied*, 104 S.Ct. 3536 (1984); *United States v. Galiffa*, 734 F.2d 306 (7th Cir. 1984); *United States v. Yeo*, 739 F.2d 385 (8th Cir. 1984); *United States v. Pazsint*, 703 F.2d 420 (9th Cir. 1983); *United States v. Griffin*, 463 F.2d 177 (10th Cir.), *cert. denied*, 409 U.S. 988 (1972); *United States v. Figueroa*, 666 F.2d 1375 (11th Cir. 1982); *Gaither v. United States*, 413 F.2d 1061 (D.C. Cir. 1969).

Third, this case presents the Court with the opportunity to eradicate the widespread confusion in the courts of appeals concerning the purported dichotomy between constructive amendments and variances. There is no constitutional foundation for this purported dichotomy under *Miller, Stirone* and *Bain*.

Fourth, as long as the Second Circuit's "substantial prejudice" test is permitted to persist, it licenses—indeed, constrains—lower courts in that circuit to engage in counter-intuitive semantic analyses of grand jury indictments in cases in which the courts perceive no such prejudice, in contravention of defendants' rights under the Grand Jury Clause of the Fifth Amendment.

5. This case also illustrates the peculiarly pernicious effects of lax enforcement of the constructive amendment doctrine in mail fraud and RICO prosecutions. These federal fraud statutes have been construed to cover an extraordinarily broad spectrum of conduct by no means apparent upon even the most painstaking reading of the statutory language.

> The current breadth of these statutes makes it *especially important that in fraud prosecutions courts vigilantly enforce the Fifth Amendment requirement that a person be tried only on the charges contained in the indictment returned by the grand jury*. A criminal statute of broad scope creates some risk that conduct will be punishable

> even though the perpetrator may have doubted in good faith that his actions fell within the coverage of the statute. To that apparently tolerable risk is added *a wholly unacceptable and unconstitutional risk when the prosecutor describes one type of actionable conduct in the indictment and then convicts the defendant for significantly different conduct.*

App. 29; 752 F.2d at 791 (emphasis added) (Newman, J., dissenting).

The indictment in this case charged Mr. Weiss with mail fraud and, derivatively, RICO. The indictment charged that the "Object of the Scheme" to defraud—the very core of criminality under the mail fraud statute—was twofold: first, that Mr. Weiss "would and did secretly and corruptly *extract cash bribes* in return for . . . caus[ing] Warner to purchase common stock in Westchester Premier Theatre"; and, second, that he "would and did secretly and corruptly *siphon and convert* . . . checks which belonged to Warner" (App. 79; Count 1 ¶¶ 4-6) (emphasis added). The indictment was bereft of any reference to a cash fund or to any scheme to receive or generate cash on behalf of Warner.

The plain language and import of the indictment was that Mr. Weiss was a faithless employee engaged in a scheme to enrich himself at Warner's expense. It explicitly charged him with a scheme "for obtaining money from Warner and its stockholders." (App. 77; Count 1, ¶ 3.) At trial, however, the government abandoned this personal enrichment scheme of bribery and conversion, and eschewed the theory that Mr. Weiss obtained any cash from the company or its stockholders (App. 99, 102).

Instead, in the prosecutor's opening statement and for the first time, a wholly different scheme was charged: that, at the direction of his corporate superiors, Mr. Weiss helped to create a corporate "cash fund" for Warner. (App. 91-92.) The cash that the indictment had accused Mr. Weiss of pocketing was described throughout the trial as having been received by him "on behalf of Warner". (App. 91-92.) To cement the change in theory, the jury was charged that the existence of the cash

fund was a *sine qua non* of conviction, and it was *not* instructed that it was required to find the elements of bribery or conversion in order to convict. (App. 116.)

The prosecution's substitution at trial of the "cash fund" scheme for the indictment's bribery and conversion scheme was, in *Stirone*'s words, "neither trivial, useless, nor innocuous. . . . [Rather, it] destroyed the defendant's substantial right to be tried only on charges presented in an indictment returned by a grand jury." *Miller*, 53 U.S.L.W. at 4448-4449, *quoting with approval, Stirone*, 361 U.S. at 217 (citations omitted). In the words of the dissenting Second Circuit judge:

> A corporate official indicted for a scheme to extract bribes and convert corporate funds has a constitutional right not to be convicted unless a jury is told that he must be proven beyond a reasonable doubt to have extracted bribes or converted corporate funds. *He cannot be convicted of a scheme to add to a corporate cash fund when the indictment against him contains no allegations of such conduct.* The distinction between the scheme alleged in the indictment and the scheme for which the jury convicted is too fundamental to be ignored. The accusation that Weiss extracted bribes is plainly an allegation that he pocketed money as the price for being influenced in his job. *Yet it is undisputed that he did no such thing.*

App. 33-34; 752 F.2d at 793 (emphasis added) (Newman, J., dissenting).

The prosecution in the present case made no effort to prove the elements of bribery or conversion, which were the exclusive objects of the scheme charged in the indictment. In fact, it affirmatively proved that Mr. Weiss committed neither bribery nor conversion. For example, to prove bribery, it was incumbent upon the prosecution to establish, *inter alia*, (1) that a payment was paid to Mr. Weiss, as an employee, without the knowledge or consent of his employer, *see, e.g., American Distilling Co. v. Wisconsin Liquor Co.*, 104 F.2d 582, 585 (7th Cir. 1939); N.Y. Penal Law §§ 180.00, 180.03, 180.05 (McKinney Supp. 1984), and (2) that the bribe inured to his personal advantage, not the company's, *American Distilling*, 104 F.2d at

585; *People v. Adams*, 86 Misc.2d 634, 382 N.Y.S.2d 879 (1976). Similarly, the conversion charge required proof, among other things, that Mr. Weiss's actions were unauthorized by his superiors. *See, e.g., United States v. Paladin*, 539 F. Supp. 100, 103 (W.D.N.Y. 1982).

The prosecution, however, proved that Warner's top executives knew, authorized and consented to—indeed, directed—Mr. Weiss's actions, and that he did not personally benefit from any of the transactions. In addition, the government did not attempt to prove that the proceeds of the cash fund were used for anything other than *bona fide* corporate purposes. Rather, it conceded the proceeds were presumptively used for proper corporate purposes. (App. 134-135.) There is no known definition of "bribery" or "conversion," however expansive, that encompasses such conduct. *See generally* J. Noonan, BRIBES xi, xx-xxiii, 578-579, 588, 596 (1985).

The panel majority acknowledged these proof failures and theory variations with the observation that "the use of the words 'bribery' and 'conversion' may not have comported with their textbook definitions." (App. 23; 752 F.2d at 788.) However, it sought to bolster its variance analysis by applying a "totality of the evidence" test under which the government's change in theory was excused because: (1) the means of accomplishing the fraudulent scheme as proved at trial (the creation of "fake invoices," and the like) were the same means alleged in the indictment and (2) the prosecutor persisted in "characteriz[ing] the allegedly fraudulent transactions in these ['bribery' and 'conversion'] terms throughout the trial." (App. 22-23; 752 F.2d at 788.)

This approach, however, reflects at best a fundamental confusion between the *means* of accomplishing a fraudulent scheme and the *scheme itself*. In the indictment, the bribery and conversion allegations comprise the entirety of the charged scheme. The majority disregarded those scheme allegations and looked solely to the underlying evidence of *means* set forth in the indictment to affirm Mr. Weiss' conviction for having participated in a *different* fraudulent scheme. It thereby overlooked the pervasive change in the prosecution's case.

As Judge Newman observed in dissent:

> The *core allegation* of the RICO and the predicate mail fraud counts against Solomon Weiss *was his participation in a scheme to defraud*. The scheme charged in the indictment was a scheme to extract bribes and convert corporate checks. The scheme for which Weiss stands convicted, however, was a scheme to create a cash fund for his corporate employer. Since the alleged extraction of bribes and conversion of corporate funds were alleged to be in breach of the defendant's fiduciary duties to his corporate employer, *the plain implication of the indictment is that the bribery and conversion were accomplished to the detriment of the corporation*. However, creation of the cash fund, for which Weiss was convicted, was indisputably for the benefit of the corporation. The two schemes are fundamentally different in their nature and their effect. *They may even be different in their criminality, since bribery and conversion of corporate funds are undoubtedly unlawful, whereas creation of a cash fund for a corporation's benefit may not be.*

App. 29-30; 752 F.2d at 791 (emphasis added).[5]

Strikingly, if the bribery and conversion allegations—not proved at trial—were to be pruned from the indictment, the remaining allegation of a fraudulent scheme would merely track the language of the mail fraud statute. Such an indictment would be insufficient as a matter of law. "[A]n indict-

---

5 Moreover, the majority's acquiescence in the makeweight government argument that the cash fund was a "shorthand expression" for the fraudulent scheme or "simply traced the proceeds" of the illegal scheme (App. at; 752 F.2d at 789) suffers from similar defects. The bribery and conversion scheme alleged in the indictment—the charge that Mr. Weiss "obtain[ed] money from Warner and its stockholders"—plainly meant, and necessarily entailed, that the proceeds inured to the benefit of Mr. Weiss. In contrast, the cash fund scheme plainly meant, and the government explicitly conceded, that the proceeds never inured to the benefit of Mr. Weiss but remained with his corporate employer. To view the cash fund as a "short hand expression" the majority had to reach a tortured and counter-intuitive interpretation of the indictment's language. The dissent, in contrast, reads the indictment as it is written, "plainly charg[ing] that Weiss, not Warner, ended up with the $170,000 cash." (App. at 31; 752 F.2d at 792)

ment must do more than simply repeat the language of the criminal statute." *Russell v. United States*, 369 U.S. 749, 764 (1962).[6]

The constitutional provision that a trial may be held in a serious federal criminal case only if a grand jury has first intervened "reflects centuries of antecedent development of common law, going back to the Assize of Clarendon in 1166." *Russell v. United States*, 369 U.S. at 761. The 800-year history of this requirement reflects the fundamental nature of this protection of the individual from "hasty, malicious and oppressive persecution" by "standing between the accuser and the accused." *Wood v. Georgia*, 370 U.S. 375, 390 (1962).[7]

In *Russell*, this Court stressed the identity of the constitutional deprivations occasioned by an insufficient indictment and those occasioned by a constructive amendment of an indictment. 369 U.S. at 770-71. The Court highlighted the importance of the constructive amendment doctrine in ensuring the fulfillment of the explicit constitutional guarantee of indictment by a grand jury:

> *Any other doctrine would place the rights of the citizen*, which were intended to be protected by the constitutional provision, *at the mercy or control of the court or prosecuting attorney*; for, if it be once held that changes can be

---

6 "Undoubtedly the language of the statute may be used in the general description of an offense, but it must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged." *United States v. Hess*, 124 U.S. 483, 487. *See also Pettibone v. United States*, 148 U.S. 197, 202-204; *Blitz v. United States*, 153 U.S. 308, 315; *Keck v. United States*, 172 U.S. 434, 437; *Morissette v. United States*, 342 U.S. 246, 270 n. 30.

Russell, 369 U.S. at 765. *See also United States v. Hess*, 124 U.S. 483 (1888) (mail fraud indictment that merely parrots language of statute is insufficient).

7 *See also Hale v. Henkel*, 201 U.S. 43, 59 (1906). *See generally* Note, *The Grand Jury as an Investigatory Body*, 74 Harv. L. Rev. 590 (1961); Goldstein, *The State and the Accused: Balance of Advantage in Criminal Procedure*, 69 Yale L.J. 1149, 1170 (1960); McClintock, *Indictment by Grand Jury*, 26 Minn.L.Rev. 153, 156 (1942); R. Younger, The People's Panel (1963); 1 W. Holdsworth, History of English Law (1927).

> made by the consent or the order of the court in the body of the indictment as presented by the grand jury, and the prisoner can be called upon to answer to the indictment as thus changed, the restriction which the Constitution places upon the power of the court, in regard to the prerequisite of an indictment, in reality no longer exists." Ex parte Bain, supra, at 10, 13. We reaffirmed this rule only recently, pointing out that "*The very purpose of the requirement that a man be indicted by grand jury is to limit his jeopardy to offenses charged by a group of his fellow citizens acting independently of either prosecuting attorney or judge.*" Stirone v. United States, supra, at 218.

Russell, 369 U.S. at 771 (emphasis added).

In the present case, as in *Russell*, the "cryptic form of indictment . . . requires the defendant to go to trial with the chief issue undefined. It enables his conviction to rest on one point and the affirmance of the conviction to rest on another. It gives the prosecution free hand on appeal to fill in the gaps of proof by surmise or conjecture." *Id.* at 766. That is not, in this case as in *Russell*, constitutionally permissible.

The majority of the court of appeals, however, was not simply analyzing the record to determine whether the "trial evidence had 'amended' the indictment by *broadening* the possible bases for conviction from that which appeared in the indictment, as this Court's opinions require." *Miller*, 53 U.S.L.W. at 4448 (summarizing the holding of *Stirone*) (Court's emphasis). Rather, with its misplaced focus, the majority was conducting an excursis to discern from the appellate record whether Mr. Weiss had, in its view, received "adequate notice" of the government's change in theory to avoid "substantial prejudice in his trial preparations." (App. 27; 752 F.2d at 790-791.) It is undisputed that the defense was never apprised of the cash fund theory prior to trial. However, the majority inferred that Mr. Weiss had "adequate notice of the charges against him" (App. 27; 752 F.2d at 790) for three reasons: (1) because trial counsel for Mr. Weiss did not object to the government's introduction of the cash fund theory at trial; (2) because ten months before trial the prosecution

notified Mr. Weiss "that it would not claim that he had kept any of the money for his own personal use;" and (3) because Mr. Weiss took the stand in his own defense and denied receipt of the cash. (App. 26-27; 752 F.2d at 790.)

Yet none of these ostensible "substantial prejudice" rationales has any vitality under the holdings in *Miller*, *Stirone* and *Bain*. Trial counsel's failure to object to the cash fund theory when it was proffered for the first time at trial neither justifies nor excuses the derogation of Mr. Weiss's substantial right to be tried only on charges presented in an indictment returned by a grand jury. "Deprivation of such a basic right is far too serious to be treated as nothing more than a variance and then dismissed as harmless error." *Stirone*, 361 U.S. at 217 (citations omitted), *quoted with approval* in *Miller*, 53 U.S.L.W. 4449. Similarly, the prosecutor's pretrial disavowal, in an informal bill of particulars, of any claim that Mr. Weiss personally kept the cash did not apprise the defense of the cash fund theory nor, of course, did it constitute a superseding indictment sufficient to amend that returned by the grand jury.[8] "[A] bill of particulars cannot save an invalid indictment." *Russell v. United States*, 369 U.S. at 770. Finally, Mr. Weiss's exercise of his right to take the stand in his own defense certainly does not divest him of his rights under the Grand Jury Clause of the Fifth Amendment.[9]

---

8 A superseding indictment was returned in this case shortly before trial—and Mr. Weiss was tried on that superseding indictment—but the alleged "Objects of the Scheme" to defraud (*viz.*, bribery and conversion) were not amended, and the cash fund theory was never disclosed.

9 The majority's misplaced "substantial prejudice" focus is also factually misguided. In fact, the defense was substantially prejudiced by the prosecution's pretrial concealment of the cash fund theory. Ignorant of the theory until the government's opening statement, the defense was totally precluded from preparing a factual defense on this claim. The prejudicial effect of this preclusion is no mere theoretical possibility. The defense could have produced abundant evidence as to the non-existence of the government-touted "Warner cash fund." Even the government's star witness, Warner Executive Vice President Jay Emmett (who later became President of the Company), admitted that he never heard of the Warner cash fund at any time during his career at Warner, except for the one sentence reference to it in 1973 made by Warner's Chairman of the Board, to which Emmett testified at trial.

As Judge Newman observed in dissent:

> The various arguments advanced [by the majority] to excuse or mitigate the fundamental switch from the crime charged to the crime proved are unavailing. *Whether Weiss was surprised or prejudiced, or was himself at fault for not objecting to the prosecutor's opening, the evidence, or the jury charge, is all beside the point because a constructive amendment of an indictment is the "[d]eprivation of such a basic right" that it cannot be "dismissed as harmless error."* Stirone v. United States, supra, 361 U.S. at 217. Weiss does not complain of overreaching argument, inadmissible evidence, or an incorrect statement of the law in the charge; his point is that the notice requirement of the Fifth Amendment has been violated. It is the totality of the trial that demonstrates the correctness of his position.

App. 35; 752 F.2d at 794 (emphasis added).

The panel majority's "reluctan[ce]" to apply the constructive amendment doctrine is inconsistent with the holdings of this Court and the other courts of appeals, it reflects the admitted "confusion" of the untenable dichotomy between constructive amendments and variances which remains in common use, and it sanctions relieving the government of its burden of proving the crime charged in the indictment. It should not be permitted to stand.[10]

Mail Fraud

1. For two centuries, it was black letter law that there is no federal common law of crimes. *See, e.g., United States v. Hudson & Goodwin*, 7 Cranch 32, 32-33 (1812); *United States v. Eaton*, 144 U.S. 677, 687 (1892); *Donnelly v. United States*, 276 U.S. 505, 511 (1928); *D'Oench, Duhme & Co., Inc. v. Federal Deposit Ins. Corp.*, 315 U.S. 447, 468-469 & n. 7 (1942) (Jackson, J., concurring).

---

10 At the very least, in view of the irreconcilable conflict between the majority opinion below and this Court's opinion in *Miller*, the court of appeals judgment should be vacated and the case remanded on this point alone.

In the last decade, however, the courts of appeals have progressively broadened the scope of the mail fraud statute to reach conduct previously considered perhaps unethical but never criminal prior to the verdicts of conviction in the cases coming before them. *See, e.g., United States v. Isaacs*, 493 F.2d 1124 (7th Cir.), *cert. denied*, 417 U.S. 976 (1974) (governor's undisclosed arrangement to purchase racetrack stock at below market prices from owner of racing interests in return for agreeing to promote interests before state racing board and state legislature violates mail fraud statute); *United States v. Bryza*, 522 F.2d 414 (7th Cir. 1975), *cert. denied*, 426 U.S. 912 (1976) (employee's failure to disclose receipt of kickbacks to employer, even though the defendant secured best possible deal for his employer, constitutes mail fraud); *United States v. Bronston*, 658 F.2d 920 (2d Cir. 1981), *cert. denied*, 456 U.S. 915 (1982) (lawyer's nondisclosure of his conflict of interest to firm client, absent any proof that the lawyer abused his fiduciary relationship with the client, violates mail fraud statute); *United States v. Margiotta*, 688 F.2d 108 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983) (nondisclosure by local political party chairman who held no public office that he had received a set percentage of commissions from insurance brokers doing business with town and county constitutes breach of fiduciary duty owed to general citizenry and thus mail fraud).

2. This case presents the Court with the most expansive construction given the mail fraud statute by any court to date—a construction whose validity the panel majority itself considered to be a "close question" (App. 12; 752 F.2d at 784). Mr. Weiss was convicted of mail fraud for participating, at his superiors' direction, in the creation of a corporate cash fund that was not shown, and not found, to have been used for any noncorporate, or even improper, purpose. Indeed, the prosecution conceded that the cash fund's proceeds were presumptively used for *proper* corporate purposes (App. 134-135).

There was, moreover, no evidence that the cash fund scheme contemplated or caused any harm or injury to Warner or its stockholders. Nor was there any claim, and the court of

appeals did not conclude, that the creation of the cash fund, as such, was unlawful.[11] Rather, Mr. Weiss—an assistant treasuer of Warner with no reporting obligations under the federal securities laws and no opportunity in fact to communicate with Warner shareholders—was taxed with criminal liability for having failed to disclose the existence of the cash fund to Warner's shareholders. (App. 14; 752 F.2d at 785.)

The panel majority acknowledged that:

> Appellant's argument that he did not violate the mail fraud statute because his creation of the cash fund was not illegal, was not intended to harm Warner or its shareholders, and did not lead to any personal gain presents a close question.

App. 12; 752 F.2d at 784. Nonetheless, analogizing the present case to the Second Circuit's earlier decision in *United States v. Siegel*, 717 F.2d 9 (2d Cir. 1983), the majority stated that the jury "could reasonably have concluded that the disbursement of corporate funds for fake feasibility studies and fake invoices for non-rendered services established non-corporate use of the funds." (App. 13-14; 752 F.2d 784-785.) This statement ignores, however, that the jury was never called upon to reach such a conclusion and never in fact did so.

Unlike *Siegel*, in which the jury was instructed that it could find a fraudulent scheme if it found that the defendants were engaged in accumulating cash for the purpose of "bribes and self-enrichment," 717 F.2d at 16, the jury in the instant case was instructed only that it need find the creation of a cash fund to convict. Given the government's concessions (1) that Mr. Weiss did not use the fund for purposes of self-enrichment and (2) that the fund was presumptively used for Warner's corporate benefit, the jury was not given the opportunity to—and did not—determine that the evidence established noncorporate

---

11 The conduct charged by the prosecution antedated enactment of the Foreign Corrupt Practices Act of 1977, Pub. L. No. 95-213, 91 Stat. 1494 (1977), Title I of which was enacted precisely because "falsification of corporate books and records" was not theretofore illegal. *See* Senate Comm. on Banking, Housing and Urban Aff., *Foreign Corrupt Practices And Domestic And Foreign Investment Improved Disclosure Acts of 1977*, S. Rep. No. 114, 95th Cong., 1st Sess. at 1-2, 3, 7 (1977).

use of the funds. The government never argued the point and the jury was never asked to infer it. Accordingly, the crucial finding—that the cash fund was devoted to noncorporate purposes—was not submitted to, nor made by, the jury. As summarized by the dissent:

> The essence of assembling a corporate cash fund, if such be unlawful, is the breach of a fiduciary's obligation to make material disclosures, an obligation that we have held violates the mail fraud statute in this context *only* when it is proven that the funds were used for noncorporate purposes.

App. 34-35; 752 F.2d at 794 (emphasis added) (citing *Siegel, supra*, 717 F.2d at 714).

Absent a jury finding that the cash fund was used for noncorporate purposes, the majority opinion has sustained a mail fraud conviction even though the government did not establish the existence of a scheme that contemplated, much less caused, actual harm or injury. Mr. Weiss's conviction was predicated solely upon falsification of certain documents prior to the enactment of the Foreign Corrupt Practices Act and arranging for *de minimis* payments to be made for consideration, albeit not the consideration for which they were ostensibly made. No court has previously held that a corporate employee acting in furtherance of his corporation's interest, even if the acts involve questionable conduct, commits mail fraud because, in hindsight, the corporation ultimately suffers an immaterial financial loss (in this case, due to the subsequent drop in value of WPT stock). Nor has any court held that an employee breaches any duty of providing "honest and faithful services, undivided loyalty" to his employer by acting at the direction of the corporation's chief executive officers presumptively to further the corporation's interests, in a manner not designed or intended to result in any personal gain.

3. Review is appropriate in this case to permit the Court to delineate the parameters of the federal law of fiduciary duty insofar as it is encompassed by the mail fraud statute and to provide guidance to the lower courts concerning the reach of

this statute, which "is seemingly limitless on its face." *United States v. Margiotta*, 688 F.2d at 120. Appropriate boundaries should be set on the government's inexorable incursions into internal corporate decisionmaking, and the limits of criminalization under the mail fraud statute should be defined.

Jury Misconduct in Procuring Extra-Record Evidence

1. This case also presents the Court with the opportunity to set the standards, and to assign and prescribe the burden of proof, governing the determination whether a criminal jury's consideration of extra-record evidence has irretrievably tainted the defendant's trial. This is an issue on which the courts of appeals and state courts of last resort are split, based upon at least three conflicting readings of this Court's opinions in *Remmer v. United States*, 347 U.S. 227 (1954), and *Smith v. Phillips*, 455 U.S. 209 (1982).

Both *Remmer* and *Phillips* dealt with what generically may be termed "jury taint," although neither directly concerned a jury's procuring and considering extra-record evidence. In *Remmer*, a tax evasion prosecution, an unknown third party approached a juror during the trial "and remarked to him that he could profit by bringing in a verdict favorable to the petitioner." 347 U.S. at 228. Without a hearing or any notice to the defense, the district judge and the prosecutor arranged an FBI investigation and determined that the improper conduct was inconsequential. The trial proceeded uninterrupted and the defendant was convicted, unaware until sometime subsequent that the incident had occurred.

This Court vacated the judgment and remanded to the district court with directions to hold a hearing to determine whether the incident was harmful to the defendant. The Court held that:

> In a criminal case, any private communication, contact, or tampering, directly or indirectly, with a juror during a trial about the matter pending before the jury is, for obvious reasons, deemed *presumptively prejudicial*, if not made in pursuance of known rules of the court and the instructions and directions of the court made during the trial, with full knowledge of the parties.

347 U.S. at 229 (emphasis added). This Court further held that, while the presumption is not conclusive, "*the burden rests heavily upon the Government* to establish . . . that such contact with the juror was harmless to the defendant." *Ibid.* (emphasis added).

Smith v. Phillips, in contrast, involved a juror's applying for employment as a felony investigator with the prosecuting attorneys' office during the course of defendant's murder trial. Although the prosecutors were aware of the application before the trial concluded, they did not apprise the trial court or the defense until after the verdict of conviction was rendered. 455 U.S. at 212-213. At a post-trial hearing, the trial judge concluded that the incident had not deprived the defendant of a fair trial. *Id.* at 213-214.

Reviewing a lower federal court's grant of habeas corpus relief, this Court reversed on a variety of grounds not immediately applicable to the present case. The issue before this Court was not the appropriate standard of proof required to demonstrate that jury misconduct is harmless. However, in a pertinent passage which has generated confusion among the courts of appeals, this Court introduced its discussion of *Remmer* with the statement:

> This Court has long held that the remedy for allegations of juror partiality is a hearing in which *the defendant has the opportunity to prove actual bias.*

455 U.S. at 215 (emphasis added).

2. Since *Phillips*, the courts of appeals and state courts of last resort have split as to (a) whether the "presumptively prejudicial" standard still applies in jury taint cases; (b) whether it is the prosecution or the defense that now bears the burden of proving the impact on the jury—and the fairness of the trial—of extra-record evidence; and (c) precisely what that burden is.

In *United States v. Pennell*, 737 F.2d 521 (6th Cir. 1984), *cert. denied*, 105 S.Ct. 906 (1985), the Sixth Circuit read *Phillips* as holding that *Remmer* no longer governs the question of the burden of proof but "only controls the question of

how the district court should proceed . . . *i.e.*, a hearing must be held . . . ." *Id.* at 532. The Sixth Circuit declared that:

> In light of *Phillips*, the *burden of proof rests upon a defendant* to demonstrate that unauthorized communications with jurors resulted in *actual* juror partiality. *Prejudice is not to be presumed.*

Id. at 532 (emphasis added). The First Circuit has held, to the same effect, that *Phillips* overruled *Remmer*'s "presumptively prejudicial" standard and that the burden is now on the defendant to prove actual prejudice. *United States v. DeLutis*, 722 F.2d 902, 909 (1st Cir. 1983).

The Ninth Circuit, in contrast, has rejected this analysis of *Phillips* and reaffirmed its view that, under *Remmer*, the injection of extra-record matter into jury deliberations remains "presumptively prejudicial;" that the government continues to bear the burden of proof, and that this burden is to "prove beyond a reasonable doubt that the juror's reading of [extra-record evidence] was harmless." *United States v. Littlefield*, 752 F.2d 1429, 1432 (9th Cir. 1985). The Third Circuit and the Supreme Courts of Wisconsin and Connecticut also hold that the "presumptively prejudicial" standard remains applicable and that the government bears the burden of proving harmlessness beyond a reasonable doubt. *Government of Virgin Islands v. Joseph*, 685 F.2d 857, 864 (3d Cir. 1983); *State v. Poh*, 116 Wis. 2d 510, 343 N.W.2d 108, 116-118 (1984); *State v. Asherman*, 193 Conn. 695, 478 A.2d 227, 251-254 (1984), *cert. denied*, 53 U.S.L.W. 3668 (1985).

Six courts of appeals, including the court below, have affirmed the vitality of the "presumptively prejudicial" standard and acknowledged that the burden of proof is on the government to make "an affirmative showing . . . that the [extra-record] information is harmless," but—unlike the four courts just discussed—they do not require that the burden be borne beyond a reasonable doubt. App. 9; 752 F.2d at 783. *See also United States v. Barnes*, 747 F.2d 246, 250-251 (4th Cir. 1984); *Owen v. Duckworth*, 727 F.2d 643, 646 (7th Cir. 1984); *United States v. Delaney*, 732 F.2d 639, 642 (8th Cir. 1984); *Rinker v. County of Napa*, 724 F.2d 1352, 1354 (9th Cir. 1983) ("[r]ebuttal requires a strong contrary showing"); *Hobson v.*

Wilson, 737 F.2d 1, 47 (D.C. Cir. 1984) ("a presumption of prejudice arises that is rebuttable only by a strong contrary showing"). Additionally, the Tennessee and Ohio courts apply the same rule. *State v. Blackwell*, 664 S.W.2d 686, 689 (Tenn. 1984); *State v. King*, 10 Ohio App.3d 161, 460 N.E.2d 1383, 1388, *leave to appeal denied*, No. 83-1283 (Sept. 21, 1983).

3. Only the "presumptively prejudicial" standard, coupled with the placement on the prosecution of the burden of proving harmlessness beyond a reasonable doubt, is consistent with this Court's holdings in *Remmer*, *Chapman v. California*, 386 U.S. 18 (1967), and the long line of cases constitutionally mandating that a criminal defendant's guilt or innocence be adjudicated only upon the evidence properly introduced at trial.

The *Chapman* doctrine imposes upon the prosecution—"the beneficiary" of any constitutional error in the receipt of evidence or comments at trial—the burden of proving harmlessness beyond a reasonable doubt. 368 U.S. at 23-24. This doctrine has consistently been applied by this Court in the context of Fifth and Sixth Amendment violations in criminal cases. *See, e.g.*, *Moore v. Illinois*, 434 U.S. 220, 232 (1977) (Sixth Amendment right to counsel); *Harrington v. California*, 395 U.S. 250, 251-254 (1969) (Sixth Amendment confrontation right); *Fontaine v. California*, 390 U.S. 593, 596 (1968) (Fifth Amendment privilege against self-incrimination).

That a criminal jury's resort to extra-record evidence during deliberations constitutes grave constitutional error is beyond dispute. It is a fundamental precept of our criminal justice system that the "conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence." *Patterson v. Colorado*, 205 U.S. 454, 462 (1907). This principle is grounded in the defendant's Sixth Amendment rights of confrontation and cross-examination and his Fifth Amendment right to due process. *Parker v. Gladden*, 385 U.S. 363, 365 (1966). As this Court held in *Turner v. Louisiana*, 379 U.S. 472, 472-473 (1965):

> In the constitutional sense, trial by jury in a criminal case necessarily implies at the very least that *the "evidence*

> *developed" against a defendant shall come from the witness stand in a public courtroom* where there is full judicial protection of the defendant's right of confrontation, of cross-examination, and of counsel.

(Emphasis added.)

Without the benefit of judicial supervision and the strictures imposed by the rules of evidence, there can be no assurance that extra-record matter that comes before a jury is probative, admissible or not substantially outweighed by prejudice to the defendant. Moreover, the constitutional guarantees of confrontation and cross-examination are so vital to testing the accuracy of trial evidence that their absence "calls into question the ultimate 'integrity of the fact-finding process.'" *Ohio v. Roberts*, 448 U.S. 56, 64 (1980), *quoting*, *Chambers v. Mississippi*, 410 U.S. 284, 295 (1973).

4. The prosecution certainly did not prove beyond a reasonable doubt that the jury's resort to extra-record evidence in this case was harmless. The jury was seriously troubled during several days of deliberations. It was confronted with an avalanche of documents, which were essentially neutral on their face, and a direct conflict between the testimony of Mr. Weiss and his accusers, the felons Horwitz and Emmett, as to what the documents signified. It sent a total of 14 substantive notes to the district court, its deliberations consumed approximately 26 hours over four days, and it deadlocked halfway through the process (App. 122).[12]

The jurors considered the question of Mr. Weiss's "guilty knowledge"—or lack thereof—to be critical to a determination of his innocence or guilt, but they were unable to decide that question on the evidence before them. They considered the inferences to be drawn from Mr. Weiss's CPA status to be

---

12 In *Parker v. Gladden*, 385 U.S. at 365, this Court dismissed the prosecution's suggestion that there was no prejudice to the defendant in a bailiff's commenting to jurors that the defendant was guilty, stressing, *inter alia*, that—in that case as in this—"the jurors deliberated for 26 hours, indicating a difference among them as to the guilt of petitioner."

crucial to that determination. (App. 153, 156-157, 160, 170, 184.) But they were admittedly ignorant of what inferences as to Mr. Weiss's knowledge or intent could be drawn from that CPA status. (App. 64, 126-127, 170, 175, 184). Moreover, the government has conceded, and the district court found, that there was no evidence in the record as to the nature and functions of certified public accountants (App. 63, 125).

As a result, the jurors deemed it necessary to obtain extra-record evidence on this score. The very fact that the jury believed extra-record evidence to be a necessity is indicative of serious prejudice to Mr. Weiss. *Gibson v. Clanon*, 633 F.2d 851, 855 (9th Cir. 1980), *cert. denied*, 450 U.S. 1035 (1981) (new trial ordered notwithstanding that the prosecution's case was "a strong one").

Furthermore, the extra-record matter to which the jury turned was apparently authoritative in nature and seemingly resolved the fact question to which they required an answer. Ostensible authoritativeness compounds the damage. *See Gibson*, 633 F.2d at 853-854 (new trial ordered where jurors consulted encyclopedia); *Paz v. United States*, 462 F.2d 740, 745 (5th Cir. 1972) (case remanded where drug prosecution jurors consulted two books concerning drug trafficking).

Finally, the extra-record evidence was of dubious admissibility and clearly was not admissible without cautionary and limiting instructions of the sort that the district court stated it would have given had the material actually been offered into evidence (App. 64-65 and n. 34). The deliberations were therefore tainted with extra-record matter which was not, and could not properly have been, before the jury in the fashion it was, nor used for the purposes for which it was used.

In so close a case, the impermissible injection of extra-record evidence to resolve a fact question that the jury deemed crucial, prejudiced Mr. Weiss and violated his Fifth and Sixth Amendment rights. The jurors' direct testimony precludes any finding that this constitutional error was harmless beyond a reasonable doubt, and no such finding was made. Review, and remand for a new trial, are appropriate.

5. Finally, this case presents the Court with a serious misapprehension as to the proper methodology for assessing the harm of jury taint, whatever be the burden of proof, and a conflict between two courts of appeals on this subject.

The district court[13] acknowledged that the juror contamination question before it was "a difficult one" and "very close" (App. 62, 66). Further, the district court rightly rejected the government's arguments that the extra-record evidence before the jury was either (a) cumulative of evidence in the record; (b) within the common knowledge of the jurors; (c) permissibly relied upon because it might have been admissible had the government offered it (since in such circumstances the district court would have admonished the jury as to the limited uses to which such evidence might properly be put); or (d) the subject of any curative instruction to the jury (App. 63-65).

However, the district court proceeded to ignore the direct testimony of the jurors as to the insufficiency of the record evidence and their consequent need to resort to the apparently authoritative accounting textbook to resolve "[o]ne of the key aspects of deciding whether or not Mr. Weiss was guilty." It engaged instead in an exegetical analysis of the record to determine what evidence the jury might have, but did not, content itself with. Because the district court determined there to be sufficient evidence in the record to sustain a conviction, it declined to set aside the verdict. (App. 65-66.)

The question before this Court, therefore, is whether the jurors' testimony as to their actual need for, and reliance on, the extra-record evidence may properly be disregarded in resolving the question of prejudice to the defendant—that is, whether a judicial analytic exercise may properly be substituted for the jurors' unequivocal testimony. The Fourth Circuit has expressly rejected the view, adopted by the court below, that the sufficiency of the record evidence excuses the prejudice introduced by the jury's consideration of extra-record evi-

---

13 With respect to methodology, the panel majority deferred entirely to the district court (App. 10; 752 F.2d at 783), whose analysis must be scrutinized.

dence. *United States v. Barnes*, 747 F.2d at 249. It is respectfully submitted that, if the constitutional safeguards are to have any prophylactic effect and the "presumptively prejudicial" standard to have any meaning, direct evidence of actual prejudice must be dispositive. Consequently, certiorari should be granted to establish this methodology and resolve the conflict between the courts of appeals.

Materiality of Perjury as a Jury Issue

It is beyond dispute that the Constitution requires the prosecution to prove every element of the crime charged beyond a reasonable doubt to the satisfaction of the jury. *Sandstrom v. Montana*, 442 U.S. 510, 520-523 (1979); *United States v. United States Gypsum Co.*, 438 U.S. 422, 435, 446 (1978); *Mullaney v. Wilbur*, 421 U.S. 684, 697-700 (1975); *In re Winship*, 397 U.S. 358, 364 (1970); *Morissette v. United States*, 342 U.S. 246, 274-275 (1952).

It is equally incontrovertible that materiality is an essential element of the crime of perjury. The statute proscribes only "false *material* declaration[s]." 18 U.S.C. § 1623(a) (emphasis added). Accordingly, it is respectfully submitted that the issue of materiality constitutionally must be determined by jury verdict.

As the court below observed, the rule of decision in the federal courts—without guidance from this Court—has been to the contrary. (App. 17; 752 F.2d at 786.) Certain state courts, however, applying various analyses, have determined that the materiality of perjury is necessarily a jury question. *See, e.g., People v. Clemente*, 285 App.Div. 258, 262, 136 N.Y.S.2d 202, 205-206 (1st Dep't 1954), *aff'd*, 309 N.Y. 890, 131 N.E.2d 294 (1955); *Commonwealth v. McDuffee*, 379 Mass. 353, 398 N.E.2d 463, 469 (1979); *Cox v. State*, 13 Ga.App. 687, 79 S.E. 909 (1913).

Moreover, the federal cases which hold that materiality is a question for the court rest upon an antiquated precedent of dubious reliability, *Sinclair v. United States*, 279 U.S. 263 (1929). *Sinclair*, which did not even involve a prosecution for perjury (but criminal contempt of Congress) is no longer sound

authority because the cases upon which it relied—*Interstate Commerce Commission v. Brimson*, 154 U.S. 447 (1894), and *Horning v. District of Columbia*, 254 U.S. 135 (1920)—have effectively been overruled.[14]

Notably, materiality as an essential element of other offenses is recognized to be a jury question.[15] These other offenses include tax fraud. *United States v. Null*, 415 F.2d 1178 (4th Cir. 1969). Significantly, the instant case included four counts of alleged tax fraud. On those counts, the jury was obviously concerned with the issue of materiality because it expressly requested an instruction from the court on that question during the course of deliberations. (App. 129-130.) Ultimately, the jury acquitted Mr. Weiss on all of the tax fraud counts.

This case provides an excellent opportunity for this Court to decide the materiality issue. In as close a case as that before this Court, and particularly in light of the jury's demonstrated concern with materiality in the tax fraud context, the prejudice to Mr. Weiss resulting from the district court's failure to submit the materiality issue to the jury is apparent. It is respectfully submitted that the district court was correct when it articulated the view that it "is a serious infringement on the right of a jury trial in a criminal case" to withdraw the issue of

---

14 *Brimson* was effectively overruled by *Bloom v. Illinois*, 391 U.S. 194 (1968), which precluded imprisonment for a serious criminal contempt without a jury trial. The holding in *Horning* that a trial judge may instruct the jury that the facts in a criminal case are undisputed is clearly invalid in light of this Court's decisions in *Sandstrom*, *United States Gypsum Co.*, *Mullaney* and *Winship*. *See United States v. Hausmann*, 711 F.2d 615 (5th Cir. 1983) (recognizing the force of the argument "that *Sinclair* . . . violate[s] the cardinal principle that a trial court in a criminal case may never direct a verdict on any essential element of an offense").

15 Many courts, for example, hold materiality to be a jury issue under 18 U.S.C. § 1001, which governs the making of false statements to a United States agency. *See, e.g., United States v. Irwin*, 654 F.2d 671, 677 n.8 (10th Cir. 1981), *cert. denied*, 455 U.S. 1016 (1982); *United States v. Valdez*, 594 F.2d 725, 729 (9th Cir. 1979). Materiality is also a jury question in the context of securities laws violations. *See, e.g., TSC Industries, Inc. v. Northway, Inc.*, 426 U.S. 438, 450 (1976); *Huddleston v. Herman & MacLean*, 640 F.2d 534 (5th Cir. 1981), *aff'd in part, rev'd in part on other grds.*, 459 U.S. 375 (1983).

a purported perjury's materiality from the jury and not to require the prosecution to prove that "element of the crime beyond a reasonable doubt" (App. 104).[16] Mr. Weiss's perjury convictions should therefore be reversed and remanded for a new trial to permit a jury determination on the issue of materiality.

---

16 The trial court, although sympathetic to Mr. Weiss's contention, felt constrained by Second Circuit precedents to take the materiality issue from the jury. She stated:

> I am an inferior court and am aware of the obligations of an inferior court to obey clearly the delineated rule of the Circuit, and I will do that. But for the record I am certainly going to say that I am doing it because of my judicial obligation and not because I am convinced that its an appropriate ruling, and I would certainly encourage Mr. Kasanof [defense counsel] in the event that there is a conviction that this matter be appealed all the way up to the United States Supreme Court where they can directly confront an issue as this, *which I feel is a serious infringement on the right of a trial jury in a criminal case* to determine whether or not the government has proven each and every element of the crime beyond a reasonable doubt.

(App. 104 (emphasis added)).

CONCLUSION

For each of the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

LEON SILVERMAN, P.C.
Attorney of Record
One New York Plaza
New York, New York 10004
(212) 820-8000

Of Counsel:

GREGORY P. JOSEPH
BONNIE KAYATTA-STEINGART
DALE M. CENDALI
FRIED, FRANK, HARRIS, SHRIVER
& JACOBSON

Attorneys for Petitioner

84-1645 (2)

No. ____

Office - Supreme Court, U.S.
FILED
APR 19 1985
ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

UNITED STATES OF AMERICA,

Respondent,

—against—

SOLOMON WEISS,

Petitioner.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

APPENDIX

LEON SILVERMAN, P.C.
Attorney of Record
One New York Plaza
New York, New York 10004
(212) 820-8000

Of Counsel:

GREGORY P. JOSEPH
BONNIE KAYATTA-STEINGART
DALE M. CENDALI
FRIED, FRANK, HARRIS, SHRIVER & JACOBSON

Attorneys for Petitioner

194 PP

APPENDIX INDEX

PAGE APP.

OPINIONS

Denial of Rehearing En Banc..... 1

Panel Opinion of the United States Court of Appeals for the Second Circuit in *United States v. Weiss*, No. 84-1103 (January 7, 1985)..... 2

Opinion of the United States District Court for the Southern District of New York in *United States v. Weiss*, 81 Cr. 636 (MJL)..... 38

INDICTMENT..... 76

TRANSCRIPTS

Excerpt from the Government's opening statement, November 3, 1982..... 91

Excerpt from cross-examination of Leonard Horwitz, November 4, 1982..... 99

Excerpt from cross-examination of Jay Emmett, November 10, 1982..... 101

Excerpt from trial transcript, November 15, 1982 104

Excerpt from direct examination of Solomon Weiss, November 17, 1982..... 106

Excerpt from Government's closing statement, November 22, 1982..... 108

Excerpt from the Court's charge to the jury, November 23, 1982..... 116

Excerpt from trial transcript, November 24, 1982 117

Excerpt from trial transcript, November 26, 1982 124

PAGE APP.

Excerpt from trial transcript, November 27, 1982 128

Excerpt from post-trial hearing, February 23, 1983 133

Hearing regarding jury's use of extra-record evidence, May 25, 1983 136

Court's Exhibit Y 184

Order Denying Petition for Rehearing

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

No. 84-1103

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 20th day of February, one thousand nine hundred and eighty-five.

UNITED STATES OF AMERICA,

Appellee,

—v—

SOLOMON WEISS,

Defendant-Appellant.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the defendant-appellant, Solomon Weiss;

Upon consideration by the panel that heard the appeal, it is

Ordered that said petition for rehearing is DENIED.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ ELAINE B. GOLDSMITH
Elaine B. Goldsmith
Clerk

Opinion of the Court of Appeals

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1481 — August Term, 1983

(Submitted: July 17, 1984 Decided: January 7, 1985)

Docket No. 84-1103

UNITED STATES OF AMERICA,

Appellee,

v.

SOLOMON WEISS,

Defendant-Appellant.

Before:

NEWMAN and PRATT, *Circuit Judges*, and KELLEHER*, *District Judge.*

Appeal from a judgment of conviction in the United States District Court for the Southern District of New York.

Affirmed on all counts. Judge Newman dissents in part.

NATHANIAL H. AKERMAN, New York, NY, Special Assistant United States Attorney for the Southern District of New York (Rudolph W. Giuliani, United States Attorney for the Southern District of New York, of Counsel), *for Appellee.*

* The Honorable Robert J. Kelleher of the United States District Court for the Central District of California, sitting by designation.

LEON SILVERMAN, New York, NY (Gregory P. Joseph, Linda R. Brower, Fried, Frank, Harris, Shriver & Jacobson, New York, NY, of Counsel), *for Defendant-Appellant.*

KELLEHER, *Senior District Judge*

Solomon Weiss appeals from a judgment of conviction in the United States District Court for the Southern District of New York, Mary J. Lowe, *J.*, entered on March 13, 1984, after a jury trial. Weiss was found guilty of three counts of mail fraud, 18 U.S.C. § 1341, three counts of perjury, 18 U.S.C. § 1623, and one count of racketeering under the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. § 1962. Weiss asserts on appeal several grounds for reversal: (1) that he was denied a fair trial because of the infiltration of extra-record evidence into the jury deliberations; (2) that the government's theory and proof at trial constituted a constructive amendment of the indictment; (3) that the government failed to establish that the defendant's conduct violated the mail fraud or RICO statutes; (4) that the prosecutor's use of leading questions to present the testimony of the two key prosecution witnesses to the grand jury violated his Fifth Amendment rights; (5) that his perjury conviction should be reversed because of the prosecution's failure to disclose a known conflict of interest or defendant's "target" status at the time of his grand jury testimony; and (6) that the District Court erred by not submitting to the jury the issue of the materiality of his perjurious grand jury testimony to the jury.

We affirm on all counts.

Solomon Weiss ("Weiss") was tried under a thirteen count indictment on charges of mail fraud, perjury, racketeering, and tax fraud.

After three weeks of trial and four days of deliberation, the jury found Weiss guilty of seven of the thirteen counts charged in the indictment. Specifically, Weiss was convicted of: (1) one violation of the RICO Act, 18 U.S.C. § 1962(c); (2) three violations of mail fraud, under 18 U.S.C. § 1341; and (3) three perjury violations, under 18 U.S.C. § 1623. Weiss was acquitted of one count of mail fraud and of four counts of tax fraud, 26 U.S.C. § 7206(2).

By various post trial motions, defendant asserted each of the contentions here presented, including alleged contamination of the jury. After an extensive hearing on the prejudicial effects of this alleged contamination, the District Judge ruled that the jury had ample independent evidence to convict Weiss and denied that motion. Additionally, all of the defendant's post trial motions were denied.

On March 13, 1984, Weiss was sentenced to concurrent five-year terms of probation. As part of his conviction under the RICO Act, Weiss was ordered to disgorge 14,898 shares of Warner Communications, Inc. ("Warner") common stock and 359 Warner warrants, valued at approximately $412,000. Finally, Weiss was fined a total of $58,000.

The principal question before the jury was the relatively narrow issue as to which side proved more believable. The government presented testimony of Leonard Horowitz ("Horowitz") and Jay Emmett ("Emmett")

that Weiss had arranged for illicit cash rebates to flow from various stock purchases and from false invoices. The evidence revealed that Weiss had taken this cash and created a secret cash fund, and had forged documents to disguise the existence of this fund. The defense put great emphasis on the lack of credibility of Horowitz and Emmett. The jury found in favor of the government upon substantial supportive evidence.

The First Stock Purchase Transaction

In 1972 Horowitz became involved in a plan to establish a live entertainment theater, the Westchester Premier Theatre ("WPT" or "Theatre"). In May and June of 1973, WPT conducted an initial public stock offering in order to raise capital. The stock sold sluggishly so Horowitz offered secret inducements to select purchasers of WPT shares.

Horowitz approached Emmett, a close friend and Vice President of Warner, and offered him 10,000 shares of WPT for $75,000. Emmett chose to decline, but went to Steven Ross, Chairman of the Board of Warner, with the offer. Ross responded that Weiss, at that time the Assistant Treasurer for Warner, might be interested in the transaction. Emmett introduced Weiss to Horowitz, who then proposed the same deal. Weiss proposed a counteroffer where Warner would buy 20,000 shares of WPT stock for $150,000 if WPT would "kick back" $100,000 to Warner. Pursuant to this arrangement, Horowitz gave Weiss $50,000 in cash on the spot and promised to pay Weiss $50,000 at a later date.

Approximately one month later the agreement was modified because WPT was unable to produce an additional $50,000 in cash, the amount owed under the original

agreement. Weiss agreed to issue $50,000 in Warner checks to Horowitz in exchange for $20,000 in cash. Weiss directed Horowitz to prepare a false, back-dated invoice, purportedly from Dennis Konner ("Konner"), an attorney, to make it appear that legal services had been performed.

The Second Stock Purchase Transaction

In July of 1973, Horowitz and Weiss entered into a second stock purchase agreement. Under the terms of this new transaction, Warner was to purchase an additional 20,000 shares of WPT stock for $100,750 and, in exchange, receive a $100,000 rebate when the theater opened in early 1974. WPT's plans to open in early 1974 fell through and Horowitz renegotiated the deal with Weiss. Weiss and Horowitz devised a new scheme to garner cash for the fund. Between 1974 and 1977, Weiss would induce Warner to issue ten checks to Horowitz, and then Horowitz would deliver increments of the $100,000 debt to Weiss. Using various modes of operations, Warner issued ten bogus checks totalling $171,950 and Horowitz returned $100,000 in cash to Weiss. To make these payments appear legitimate, Weiss created false documents in Warner's accounting system and had a plagiarized report created and filed with Warner.

In sum, Warner paid out over $470,000 for non-performed services and for stock of questionable value. In return, Weiss received $170,000 in cash and 40,000 shares of WPT stock, which cost about $250,000. On paper, Warner's net loss stood at approximately $50,000.

The Basis for the Perjury Charges

After Horowitz received a letter from Weiss, of October 23, 1973, he prepared the Konner bill for unper-

formed legal services and back-dated it to July 11, 1973. The bill, filed with Warner bears the signature "J. Emmett." At trial, a handwriting expert identified the Emmett signature as written by Weiss. Other experts testified that the signature on the Konner bill was not the signature of Jay Emmett.

At trial Weiss testified that he wrote the October 23 letter prior to realizing that Warner had received the bill. Weiss also claimed that Emmett had directed him to issue a $30,000 check to Konner. Further, Weiss contended that Emmett had instructed him to write to Konner in order to obtain the bill for legal services performed by Konner's firm while working on different deals for Warner. Yet on April 10, 1978, in an appearance before a grand jury, Weiss's testimony contained certain contrary statements. There, Weiss claimed that he had prepared the July 26, 1973 check based directly on the Konner bill of July 11, 1973. Additionally, Weiss denied that Horowitz and the Konner bill were in any way connected. The indictment charged that several of Weiss's statements to the grand jury were perjurious. Substantial evidence, including Weiss's contradictory trial testimony, support these allegations.

Except for his contention that a constructive amendment of the indictment occurred, we find little merit in appellant's contentions. We shall discuss first the lesser grounds before proceeding to consideration of the more substantial issue of whether there existed error in any variation between the charges made and the proof offered by the government.

The Contamination of the Jury

In May of 1983 counsel for the appellant renewed a motion for a new trial, claiming that extra-record evi-

dence had been presented to the jury during their deliberations and that such information may well have contaminated these deliberations. The District Court conducted a hearing on the matter and discovered that information from a standard set of accounting textbooks not received in evidence had found its way into the jury deliberations.

At a hearing before the District Court it appeared that, after the presentation of the evidence but prior to the deliberations, one juror had reviewed a basic text on bookkeeping. He testified that he had read to the jurors an excerpt from the textbook that explained the responsibilities and training of CPA's as distinguished from bookkeepers.[1] The court questioned a total of ten jurors, each of whom remembered, with various levels of specificity, the discussion. The court determined that after the textual excerpt was brought up in the discussion, the jury moved on to other matters. After extensive review of this issue, the District Court ruled that the appellant's motion for a new trial should be denied.

Appellant contends that the District Court erred in denying his motion for a new trial. He asserts that his status as a CPA was essential to the jury's determination of what he knew about the ventures, and he contends that this knowledge proved to be critical on the issue of his

---

[1] One of the jurors had recited the following textual passages to the other jurors:

> *Certified public accountants* are independent professional persons comparable to attorneys or physicians, who offer accounting services to clients for a fee. The *CPA certificate* is a license to practice granted by the state on the basis of a rigorous examination and evidence of practical experience. All states require that candidates pass an examination prepared and administered on a national basis twice each year by the American Institute of Certified Public Accountants.

W. Meigs & R. Meigs, *Financial Handbook* 7 (3d ed. 1979) (emphasis in original).

guilt or innocence. Because the record contained no evidence concerning the duties of a CPA, the appellant argues that the infiltration of textbook definitions into the deliberations deprived him of a fair trial. Specifically, Weiss asserts that the contamination of the jurors by the injection of extra-record evidence fatally prejudiced him in violation of his Fifth Amendment rights to due process and his Sixth Amendment right of confrontation and cross-examination.

We have recognized that "extra-record information that comes to the attention of a juror is 'presumptively prejudicial.'" *United States* v. *Hillard*, 701 F.2d 1052, 1064 (2d Cir.), *cert. denied*, – U.S. –, 103 S.Ct. 2431, 77 L.Ed.2d 1318 (1983) (citing *Remmer* v. *United States*, 347 U.S. 227, 229, 74 S.Ct. 450, 451, 98 L.Ed. 654, 656 (1954)). This presumption may be rebutted, however, by an affirmative showing on the part of the government that the information was harmless. *Id.* "The touchstone of decision in a case such as we have here is thus not the mere fact of infiltration of some molecules of extra-record matter, . . . but the nature of what has been infiltrated and the probability of prejudice." *United States ex rel. Owen* v. *McMann*, 435 F.2d 813, 818 (2d Cir. 1970), *cert. denied*, 402 U.S. 906, 91 S.Ct. 1373, 28 L.Ed.2d 646 (1971) (citations omitted).

The trial court should assess the "possibility of prejudice" by reviewing the entire record, analyzing the substance of the extrinsic evidence, and comparing it to that information of which the jurors were properly aware. *Sher* v. *Stoughton*, 666 F.2d 791, 794 (2d Cir. 1981). The court may properly conclude that such extra-record information was non-prejudicial if it determines that an abundance of properly admitted evidence relevant to this

matter exists. *Hillard, supra,* at 1064; *Sher, supra,* at 793-94.

Additionally, the trial court has broad discretion in reviewing the issue of the prejudicial effect of the infiltration of extra-record evidence into the deliberations of the jury. *Marshall* v. *United States,* 360 U.S. 310, 312, 79 S.Ct. 1171, 1173, 3 L.Ed.2d 1250, 1252 (1959); *United States* v. *Panebianco,* 543 F.2d 447, 457 (2d Cir. 1976), *cert. denied,* 429 U.S. 1103, 97 S.Ct. 1129, 51 L.Ed.2d 553 (1977); *United States* v. *Flynn,* 216 F.2d 354, 372 (2d Cir. 1954), *cert. denied,* 348 U.S. 909, 75 S.Ct. 295, 99 L.Ed. 713 (1955). "[A] trial judge's handling of alleged juror misconduct or bias is only reviewable for abuse of discretion." *Panebianco, supra,* at 457.[2]

After an exhaustive evidentiary hearing on the issue of jury contamination, the trial judge concluded that the infiltration of the material from an accounting text into deliberations of the jury was harmless. We find no abuse of discretion in so holding. *See United States* v. *Hockridge,* 573 F.2d 752, 756 (2d Cir. 1978).

The Sufficiency of Proof of Mail Fraud

Appellant argues that his participation in the creation of a cash fund does not constitute a fraud in violation

---

[2] The Ninth Circuit has aptly noted:

> The trial judge is uniquely qualified to appraise the probable effect of information on the jury, the materiality of the extraneous material, and its prejudicial nature. He or she observes the jurors throughout the trial, is aware of the defenses asserted, and has heard the evidence. The judge's conclusions about the effect of the alleged juror misconduct deserves substantial weight.

United States v. *Bagnariol,* 665 F.2d 877, 885 (9th Cir. 1981), *cert. denied,* 456 U.S. 962, 102 S. Ct. 2040, 72 L.Ed.2d 407 (1982).

of the mail fraud statute[3] nor of RICO. Appellant contends that there was no evidence at trial that any cash was misappropriated from Warner. He alleges that the cash fund theory conjured up by the government contemplated neither harm nor injury to Warner or to its stockholders, nor involved the use of the cash fund for any improper purpose. The appellant claims that the corporate cash fund was presumptively used for the benefit of the corporation, thereby defeating any obligation to disclose to the stockholders the creation of the cash fund. Finally, the appellant argues that the mail fraud statute applies only when a party personally benefits from the misappropriation of funds.

An employee's breach of a fiduciary duty, standing alone, will not support a mail fraud violation. Rather, the government must also prove that while under a duty to disclose material information to his employer, an employee failed to do so. *United States* v. *Barta*, 635 F.2d 999, 1006 (2d Cir. 1980), *cert. denied*, 450 U.S. 998, 101 S.Ct. 1703, 68 L.Ed. 2d 199 (1981). Thus, the statute is violated when a fiduciary fails to disclose material information "which he is under a duty to disclose to another under circumstances where the non-disclosure *could* or *does* result in harm to another." *United States* v. *Siegel*, 717 F.2d 9, 14 (2d Cir. 1983) (quoting *United States* v. *Bronston*, 658 F.2d 920, 926 (2d Cir. 1981), *cert. denied*, 456 U.S. 915, 102 S.Ct. 1769, 72 L.Ed.2d 174 (1982) (emphasis added).

While the government must show that some harm or injury was contemplated by the scheme, it need not show

---

[3] Section 1341 prohibits "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretense or promises." 18 U.S.C. § 1341 (1976).

that "direct, tangible economic loss resulted to the scheme's intended victims." *Siegel, supra,* at 14; *see United States* v. *Newman,* 644 F.2d 12 (2d Cir. 1981), *cert. denied,* –U.S.–, 104 S.Ct. 1983, 78 L.Ed.2d 170 § (1983). Violations of the mail fraud statute may be based on artifices which do not deprive any person of money or other forms of tangible property. *United States* v. *Margiotta,* 688 F.2d 108, 121 (2d Cir. 1982), *cert. denied,* —U.S.—, 103 S. Ct. 1891, 77 L. Ed. 2d 282 (1983). Further, the government need not prove that the fraudulent actors actually benefited from their deception. *Id.*

Appellant's argument that he did not violate the mail fraud statute because his creation of the cash fund was not illegal, was not intended to harm Warner or its shareholders, and did not lead to any personal gain presents a close question. We have held, however, that there need not be a direct showing that the wrongful act was harmful, *per se,* to the corporation. *Siegel, supra.* In *Siegel,* two executive officers were charged with violations of the wire fraud statute, 28 U.S.C. § 1343 (1976), because of their participation in the creation of a cash fund. The scheme involved unrecorded cash sales of merchandise that had been closed out, marked down for clearance, or returned as damaged. The indictment charged the defendant with creating the illicit fund in order to bribe union officials and to increase personal coffers. *Id.* at 10-11.

In *Siegel* defendants defrauded the corporation and its shareholders by deliberately concealing and by failing to account for the sales of all corporate property and merchandise. The government theorized that such acts by top corporate officers defrauded the corporation and

its shareholders, and violated the executives' fiduciary duty to act honestly and faithfully. *Id.* at 13.

Attempting to distinguish *Siegel*, Weiss argues that the government presented no evidence that the Warner cash fund was actually used for his own personal enrichment. Weiss contends that without such an affirmative showing by the government, he cannot be convicted of a mail fraud violation. Weiss, however, misunderstands the scope of *Siegel.*

The reviewing court was satisfied with the evidence proffered by the government: a misappropriation of corporate funds coupled with the use of such funds for a non-corporate purpose. The government presented evidence that Siegel and Abrams had pocketed some of the funds and had used other amounts to bribe union officials. The court noted, however, that there was "little, if any, direct evidence to show that Siegel and Abrams used the cash proceeds for other than corporate purposes . . . ." *Id.* at 15. Yet, the court determined that there was "sufficient evidence from which the jury could reasonably have concluded that the defendants received the cash proceeds and used them for non-corporate purposes in breach of their fiduciary duties" and in violation of the wire fraud statute. *Id.* at 14.

Our case is within the ambit of the holding in *Siegel.* There is no requirement that the government prove that the misappropriated funds were used by Weiss for his own enrichment. Rather, evidence of a non-corporate purpose, explicitly or implicitly derived, will satisfy the requirements of *Siegel.* There was no direct evidence offered concerning the final destination of the misappropriated funds. However the jury could reasonably have

concluded that the disbursement of corporate funds for fake feasibility studies and fake invoices for non-rendered services established non-corporate use of the funds. Indeed the record here, as in *Siegel*, allowed the jury to "have drawn a justifiable inference that defendants used the scheme for their own benefit." *Id.* at 15. With the evidence presented here, a jury could, at the very least, infer that the diversion of corporate funds by Weiss was for a non-corporate purpose. This is sufficient to bring the case within the holding in *Siegel*.

Weiss formulated an elaborate plan, involving phony cash-generating transactions, to disguise the fund from the shareholders at Warner. He created fake feasibility studies and bogus tasks for real estate "consultants," issued checks for non-performed legal services, and purchased large amounts of speculative stock. The District Court found that the scheme to create a cash fund via the acceptance of kickbacks, the conversion of corporate assets into non-performed services, and the creation of false and fraudulent documents to conceal and disguise these illicit transactions were unquestionably acts of fraud on the corporation. We agree with this finding.

The appellant's remaining duo of contentions against his conviction under the mail fraud statute can be readily dispatched. First, Weiss claims that he was not an "officer" of Warner, thus owing no duty to disclose the cash fund to the shareholders. On review of the record, this assertion cannot be taken seriously. Finally, Weiss contends that he was acting under the direction, and with the approval, of his superiors. Consequently, he asserts that no conflict between his fiduciary duty to his employer and his participation in the cash fund scheme arose. Once more, the District Court properly rejected this argument,

noting that regardless of the fact that higher officials directed the wrongful acts, the harm was no less injurious to the corporation. *See Goldberg* v. *Meridor,* 567 F.2d 209, 217 (2d Cir. 1977).

In sum, appellant's attempts to distinguish the facts of his case from the law of mail fraud fails on all counts.

Prosecutorial Misconduct

Appellant seeks reversal of his conviction for perjury because the prosecution failed to disclose to him: (1) a known conflict of interest concerning the defense counsel that Warner had retained for him at the grand jury proceedings; and, (2) his status as a target of a government investigation. Weiss claims that this misconduct effectively deprived him of his Sixth Amendment right to representation of counsel of "undivided loyalties."

The same law firm represented both Warner and those Warner executive officers, including Weiss, subpoenaed to testify before the grand jury in 1978. Counsel advised each executive to cooperate with the investigation while in front of the grand jury. U.S. Attorneys knew that Weiss was under separate investigation for defrauding Warner, and chose not to inform counsel for defendant of this. Special Assistant U.S. Attorney Akerman feared that such a disclosure might compromise the ongoing investigation and could possibly endanger a government informant who had been wired for sound and had participated in a number of the illicit transactions.[4]

In a separate opinion, the District Court determined that Weiss's perjurious testimony before the grand jury

[4] *United States* v. *Weiss,* Mem. Op., No. 81-636, at 29 (August 10, 1982).

should not be suppressed. We affirm the holding of the lower court. A "witness sworn to tell the truth before a duly constituted grand jury will not be heard to call for the suppression of false statements to the jury . . . ." *United States* v. *Mandujano*, 425 U.S. 564, 582, 96 S.Ct. 1768, 1779, 48 L.Ed.2d 212, 226 (1976).

It is not at all clear that the prosecution misrepresented Weiss's "target" status to his defense counsel. Even if the actions of the U.S. Attorneys can somehow be construed as "misconduct," such actions did not cause sufficient prejudice to Weiss to warrant the dismissal of his perjury conviction. *See id.* at 577, 96 S.Ct. at 1776-77, 48 L.Ed.2d at 222-23.

If the appellant's claim for suppression of his grand jury testimony is predicated upon a violation of the Disciplinary Rules, this review rests within the supervisory power of this Court. *See United States* v. *Foley*, 735 F. 2d 45, 48 (2d Cir. 1984); *United States* v. *Jamil*, 707 F.2d 638, 645-46 (2d Cir. 1983); *see also United States* v. *Thomas*, 474 F.2d 110, 112 (10th Cir.), *cert. denied*, 412 U.S. 932, 93 S.Ct. 2758, 37 L.Ed.2d 160 (1973). The failure of Special Assistant U.S. Attorney Akerman to seek judicial resolution of the known conflict of interest of defendant's attorney was not motivated by bad faith or in deliberate disregard of an ethical obligation. The lower court found it inappropriate to sanction his behavior. We see no reason to disturb that determination.[8]

We must also reject the appellant's claim under constitutional principles for the suppression of his perjurious testimony. It is now well settled that a witness before a grand jury may not dismiss an indictment for

---

[8] *Id.* at 28-32.

perjury because he was the target of an investigation, *United States* v. *Dionisio*, 410 U.S. 1, 10 n.8, 93 S.Ct. 764, 769 n.8, 35 L.Ed.2d 67, 77 n.8 (1973); or because he was not advised of his *Miranda* rights, *United States* v. *Mandujano*, 425 U.S. 564, 577, 96 S.Ct. 1768, 1776-77, 48 L.Ed.2d 212, 222-23 (1977); or because no effective warning of the Fifth Amendment privilege to remain silent was given, *United States* v. *Wong*, 431 U.S. 174, 179-80, 97 S.Ct. 1823, 1826, 52 L.Ed.2d 231, 236-37 (1977). *See also United States* v. *Washington*, 431 U.S. 181, 97 S.Ct. 1814, 52 L.Ed.2d 238 (1977).

The Use of Leading Questions

We perceive no error in the prosecution's use of leading questions before the grand jury. *See United States* v. *Jacobson*, 691 F.2d 110, 115-16 (2d Cir. 1982). *See also United States* v. *Provenzano*, 440 F. Supp. 561, 565-66 (S.D.N.Y. 1977).

Materiality of Perjurious Testimony as a Jury Issue

Weiss's claim that the District Court erred in not submitting the issue of the materiality of his perjurious testimony to the jury is foreclosed by the law of this circuit. It is well settled that the materiality of perjury before a grand jury is a question for the court alone. *United States* v. *Moon (Sun Myung)*, 718 F.2d 1210, 1237 (2d Cir. 1983), *cert. denied*, – U.S. –, 104 S.Ct. 2344, 80 L.Ed.2d 818 (1984); *United States* v. *Cunningham*, 723 F.2d 217, 226 (2d Cir. 1983), *cert. denied*, – U.S. –, 104 S.Ct. 2154, 80 L.Ed.2d 540 (1984); *United States* v. *Berardi*, 629 F.2d 723, 728 (2d Cir.), *cert. denied*, 449 U.S. 995, 101 S.Ct. 534, 66 L.Ed.2d 293 (1980).

The Constructive Amendment of the Appellant's Indictment

The appellant claims that his conviction on the mail fraud and RICO counts should be reversed because the government's theory and proof at trial "radically departed" from the charging terms of the indictment. Specifically, Weiss argues that the "plain import" of the indictment suggests that he was charged with fraudulently concealing from Warner shareholders his acceptance of bribes and his conversion of corporation assets, personally enriching himself at the shareholders' expense. Weiss contends that the government abandoned this theory at trial and adopted a "cash fund" theory, accusing Weiss of breaching his fiduciary duties to Warner shareholders by fraudulently accepting cash on Warner's behalf. The appellant claims that the great discrepancy between the government's "breach of duty" theory at trial and the indictment's "bribe and conversion" theory violated his Fifth Amendment rights by precluding the jury from convicting him on the offense for which he was indicted. Further, the appellant argues that his lack of knowledge concerning the cash fund theory until trial severely prejudiced his timely preparation of an adequate defense.

The government argues that the cash fund evidence presented at trial matched the proof placed before the grand jury. The government contends that this consistent presentation refutes the appellant's allegation of shifting theories. Further, the government asserts that statements in a bill of particulars ten months prior to trial refute Weiss's claim that he was surprised by the cash fund theory at trial. Finally, the government argues that Weiss waived any "variance of theories" claim because he failed to object to any cash fund evidence or related instructions at any time during the proceedings.

A criminal defendant has a substantive right to be tried only on the charges contained in the indictment returned by the grand jury. *Ex parte Bain*, 121 U.S. 1, 7, 7 S.Ct. 781, 784-85, 20 L.Ed. 849, 852 (1887); *Stirone* v. *United States*, 361 U.S. 212, 216-17, 80 S.Ct. 270, 273, 4 L.Ed.2d 252, 256 (1960).

"An *amendment* of the indictment occurs when the charging terms of the indictment are altered, either literally or in effect, . . . [while a] *variance* occurs when the charging terms of the indictment are left unaltered, but the evidence offered at trial proves facts materially different from those alleged in the indictment." *United States* v. *Pelose*, 538 F.2d 41, 45 n.8 (2d Cir. 1976) (quoting *Gaither* v. *United States*, 413 F.2d 1061, 1071 (D.C. Cir. 1969)) (emphasis in original). While variances are subject to the harmless error rule and require a showing of prejudice to the defendant, *United States* v. *Garguilo*, 554 F.2d 59 (2d Cir. 1977), constructive amendments are generally considered prejudicial *per se*. *See United States* v. *Crocker*, 568 F.2d 1049, 1060 (3d Cir. 1977); *United States* v. *Beeler*, 587 F.2d 340, 342 (6th Cir. 1978), *cert. denied*, 545 U.S. 860, 102 S.Ct. 315, 70 L.Ed.2d 158 (1981).

There is considerable confusion as to what constitutes a constructive amendment of an indictment as opposed to a variance of an indictment. *Stirone* v. *United States*, *supra*, is the case most often cited by defendants arguing either that a constructive amendment or a variance of the indictment occurred; yet *Stirone* does not specifically address this distinction. The definition noted above has been set forth in the decisions of several circuits, including this circuit.

The appellant contends that the rule against a variance or a constructive amendment of an indictment has been frustrated by the government. *See generally United States* v. *Lemire*, 720 F.2d 1327 (D.C. Cir. 1983), *cert. denied*, — U.S.—, 104 S.Ct. 2678, 81 L.Ed.2d 874 (1984); *United States* v. *Beeler*, *supra*; *United States* v. *Silverman*, 430 F.2d 106, 111 (2d Cir. 1970), *cert. denied*, 402 U.S. 953, 91 S.Ct. 1619, 29 L.Ed.2d 123 (1971). We reject this contention, and find that both the government's theory and the proof offered at trial fairly reflect the charges set forth in the indictment.

A defendant is deprived of his right to be tried only on the charges returned by a grand jury if the prosecution's proof or theory constitute a modification at trial of an *essential element* of the offense charged. *See Lemire*, 720 F.2d at 1345; *Watson* v. *Jago*, 558 F.2d 330, 334 (6th Cir. 1977); *Silverman*, 430 F.2d at 100.

In this case the indictment charged that Weiss "did secretly and corruptly extract and accept cash bribes . . . [and] caused Warner to purchase common stock in the Westchester Premiere Theatre . . . , thereby violating [his] fiduciary duties to Warner and its shareholders to provide honest and faithful services, undivided loyalty and to perform [his] executive obligations in good faith and exclusively in the best financial interest of Warner and its shareholders."

The indictment also charged Weiss with "secretly and corruptly siphon[ing] and convert[ing] approximately $221,950 in checks which belonged to Warner and its shareholders . . . ," and with knowingly causing "fraudulent documents to be prepared" in order to make it "appear that the checks . . . were being paid to third parties

for services rendered to Warner" when in fact Weiss knew "said services were non-existent."

Finally, Weiss is charged with "having devised a scheme and artifice to defraud Warner and its shareholders and [with] obtaining money from Warner and its shareholders by means of false and fraudulent pretenses, representations and promises, unlawfully, wilfully and knowingly . . . for the purpose of executing said scheme and artifice . . . ."

In his opening statement, the prosecutor told the jury that the government's evidence should show that Weiss and other Warner executives "schemed to defraud the company of their duty to provide honest and faithful services to the company's stockholders by creating a cash fund of approximately $170,000." The prosecutor stated that the cash fund "was created out of bribes, phony invoices, false, fraudulent and misleading documentation, and Warner checks for nine [sic] existent services." Clearly, the prosecutor's opening statement tracked almost exactly the indictment. Similarly, the evidence presented at trial showed that Weiss procured $50,000 in cash in exchange for arranging the purchase of WPT stock, and received $100,000 in cash in exchange for issuing Warner checks for non-existent services. Again, the proof at trial closely followed the terms of the indictment.

After summarizing the essential allegations of the indictment, the District Court instructed the jury, in pertinent part:

> [1] The first element of [mail fraud] is the existence of a scheme to defraud or to obtain money or property by means of false or fraudulent pretenses or representations.

[2] [T]he government contends that the fraudulent scheme was the creation of the cash fund at Warner.

[3] [I]f you do find beyond a reasonable doubt that a cash fund as alleged existed at Warner, then you must go on to deliberate upon the second element of the offense of mail fraud.

[4] The second element requires that the government establish beyond a reasonable doubt that this defendant wilfully and knowingly participated in the fraudulent scheme with knowledge of its unlawful purposes and in furtherance of its unlawful objectives.

The appellant argues that the elements of the offense proved at trial had nothing to do with bribery or with conversion, or with the fraudulent concealment of cash accruing to Weiss as bribes or as converted assets, and that the cash fund theory referred to by the District Court altered an essential element of the crime. This argument has a superficial appeal because: (1) the trial judge did instruct the jury that it had to find that a cash fund existed in order to proceed to the second element of the crime; and (2) the words "cash fund" are not actually mentioned in the indictment.

The appellant's argument must fail, however, when viewed in light of the *totality* of the evidence at trial. First, the cash fund evidence presented at trial was virtually identical to the proof that was before the grand jury. Contrary to the appellant's contention, the government *never* departed from its claims in the indictment that Weiss received $70,000 in cash bribes in exchange for Warner's purchase of WPT stock and that Weiss re-

ceived $100,000 in cash in exchange for the issuance of phony checks. While the use of the words "bribery" and "conversion" may not have comported with their textbook definitions, the government continued to characterize the allegedly fraudulent transactions in these terms throughout the trial. Moreover, although the face of the indictment does not refer to a cash fund, government witness Emmett testified both before the grand jury and at trial that he had "put Horowitz in touch with Solomon Weiss [because] Horowitz could be helpful with regard to the Warner *cash fund.*" (emphasis added). Finally, it is clear that the trial judge's reference to the creation of a "cash fund" in the court's charge to the jury was nothing more than a shorthand expression for the fraudulent scheme outlined and charged in the indictment.

Appellant also argues that a constructive amendment occurred because the "plain import" of the indictment was that Weiss personally enriched himself at the expense of the Warner shareholders. We must reject this interpretation. The language of the indictment is conspicuously silent on the ultimate destination of the fraudulently obtained funds. Nothing in the definition or the generally accepted meaning of a "bribe", commercial or otherwise, would preclude the grand jury from assuming that the monies ended up somewhere other than in Weiss's pockets.

Frankly, the cash fund evidence did not change the theoretical basis of the fraudulent scheme. Rather, as the trial court concluded, "[t]he cash fund proof offered at trial was not an alternative theory, but simply traced the proceeds of the illegal scheme." 579 F. Supp. at 1244. Finally, the cases cited by the appellant in support of his constructive amendment argument are distinguishable.

In *Stirone* v. *United States*, 361 U.S. 212, 80 S. Ct. 270, 4 L. Ed. 2d 252 (1960), the defendant was indicted for, and convicted of, interference with interstate commerce under the Hobbs Act. The indictment identified "interstate commerce" as the importation of sand into the state for use in the construction of a steel mill. The trial judge instructed the jury, however, that it could convict the defendant for interference with the importation of sand *or* with the exportation of steel. The Supreme Court reversed the conviction, stating that "when only one particular kind of commerce is charged to have been burdened, a conviction must rest on that charge and not on another . . . ." *Id.* at 218, 80 S. Ct. at 273, 4 L. Ed. 2d at 257-58.*

Unlike *Stirone*, Weiss's conviction does not rest on an expansive reading of his indictment by the District Court. The charges in the indictment against Weiss were specific as to the dates of transactions, the amounts involved, and the identity of the participants. The government's proof covered each of the three types of fraudulent conduct that formed the basis of the overall scheme—accepting cash bribes in return for purchasing Theatre stock, issuing phony checks in exchange for cash payments, and preparing fraudulent documents to conceal the conversion of Warner checks. And, the lower court charged the

---

* *Cf. United States* v. *Miller*, 715 F.2d 1360, 1362-63 (9th Cir. 1983), *modified*, 728 F.2d 1270 (9th Cir.), *cert. granted*, 53 U.S.L.W. 3235 (October 1, 1984) (defendant indicted for violation of mail fraud statute by devising scheme to defraud insurer by knowing of and consenting to false burglary, then inflating amount of claimed loss, and jury convicted based solely on evidence of inflating claim, conviction could not be sustained); *but see United States* v. *Wright*, Nos. 83-1205-07, 83-1224, slip op. at 4113 (9th Cir. September 18, 1984) ("An amendment is made when the court instructs the jury on a violation that is not charged in the indictment but that is consistent with the truth adduced at trial. . . .").

jury with a succinct synopsis of the indictment. Thus, appellant's claim that *Stirone* should apply here is invalid.

Along similar lines, this court recognizes that an amendment or variance which does not alter an essential element of the charge may still deprive the defendant of an opportunity to meet the prosecutor's case. *See Berger* v. *United States*, 295 U.S. 78, 55 S.Ct. 629, 79 L.Ed. 2d 1314 (1935); *Lemire*, *supra*. As noted above, the appellant argues that he could not prepare a defense to the charges under the indictment because the government never apprised him of the "cash fund" theory prior to trial. Specifically, the appellant contends that his defenses to the charges of bribery and conversion were inapplicable to the cash fund theory.

We reject the appellant's argument that he was prejudiced in the preparation of his trial strategy by a surpirse shift in the government's theory of the case. The record proves otherwise. First, the cash fund theory was set forth in unequivocal terms at the time of the government's opening statement, throughout the remainder of the trial, and in the jury charge conference; yet at no time did the defendant raise an objection to the evidence or to the instructions regarding this theory, nor did the defendant ever request a continuance of trial on grounds that he had not been given adequate notice of the government's case.

The government argues that Weiss waived any variance claim by failing to take exception to any evidence or instruction on the cash fund. In making this argument, the government does not contend that the alleged shift in a cash fund theory at trial constitutes a variance rather than a constructive amendment; rather, it alto-

gether ignores the distinction. Weiss asserts that his case is the first true constructive amendment case to reach this court, and argues that reversal is required, notwithstanding the appellant's failure to raise the claim below. This circuit has been reluctant to construe an alleged "shift" in the government's theory or proof as a constructive amendment that would require reversal of a conviction "without regard to whether defendant was prejudiced by a difference between the indictment and the proof." *United States* v. *Heimann*, 705 F.2d 662, 665-66 (2d Cir. 1983). *See United States* v. *Sindona*, 636 F.2d 792 (2d Cir. 1980), *cert. denied*, 451 U.S. 912, 101 S.Ct. 1984, 68 L.Ed.2d 302 (1981). Rather, this circuit has treated any differences between the indictment and the proof as variances which do not require reversal absent a showing that the variance caused substantial prejudice to the defendant. *See United States* v. *Knuckles*, 581 F.2d 305, 312 (2d Cir.), *cert. denied*, 439 U.S. 986, 99 S.Ct. 581, 58 L.Ed.2d 659 (1978); *Sindona*, 636 F.2d at 798. While we decline to resolve the issue on the basis of waiver, the appellant's failure to object militates against any argument that he was surprised by or not prepared to defend against the cash fund theory.

Second, the appellant does not dispute the fact that ten months prior to trial, the government informed him that it would not claim that he had kept any of the money for his own personal use. Thus, while the government continued to refer to the cash payments Weiss received as "cash bribes," Weiss was on notice well before trial that "conventional" bribery was not part of the government's case.

Finally, the appellant implicitly argues that his defenses were appropriate against charges of bribery and

of conversion but not against a charge of creating a cash fund. On appeal, Weiss contends that he established the cash fund pursuant to orders from his superiors, and that he never personally retained any of the cash. Yet Weiss never presented such claims at trial. Rather, Weiss testified in his own defense that he knew nothing either about a scheme to sell Theatre stock or about a plan to establish a cash fund at Warner, that he never received any cash payments, and that he issued Warner checks only upon the authorization of his superiors. Had the jury been persuaded by these statements, the appellant would have been acquitted under the cash fund theory; the second element of the charged offense–the knowledge of and participation in creation of the cash fund–would have been lacking.

The record clearly establishes that the appellant had adequate notice of the nature of the charges against him. Further, Weiss never objected to the government's theory that his knowing participation in the fraudulent creation of a cash fund constituted a mail fraud violation. His testimony disavowing any such knowledge presented the jury with a credibility contest between the appellant and the witnesses of the government. Weiss lost. Accordingly, we hold that he had reasonable notice of the government's theory and, therefore, had and utilized the opportunity to contest on this ground and was not substantially prejudiced in his trial preparations.

In sum, we reject the appellant's argument that the government's presentation of the cash fund theory constituted a constructive amendment of the indictment. The fraudulent scheme detailed in the indictment and proved at trial were one and the same; the term "cash fund" was merely used as a shorthand expression for the sum

total of the fraudulent transactions comprising the scheme. The cash fund evidence offered at trial did not act as an alternative theory, but simply traced the proceeds of the illegal scheme. Finally, we conclude that to the extent that there was any variance between the indictment and the proof, it was not so substantial as to cause prejudice to Weiss.

CONCLUSION

The judgment of the District Court is affirmed on all counts.

JON O. NEWMAN, *Circuit Judge*, dissenting in part:

Believing that an unconstitutional constructive amendment of the indictment occurred at appellant's trial, I respectfully dissent from those portions of the majority's opinion and resulting judgment that affirm the RICO and underlying mail fraud convictions. In recent years, this Court has tolerated an extraordinary expansion of mail and wire fraud statutes to permit federal prosecution for conduct that some had thought was subject only to state criminal or civil law.[1] That "inexorable expansion," *United States* v. *Siegel*, 717 F.2d 9, 24 (2d Cir. 1983) (Winter, J., dissenting in part), has been questionable on its own terms, but whether we have rewritten the federal fraud statutes or only permitted prosecutors to apply the imprecise terms of these statutes in imaginative ways, there can be little doubt that the modern scope

[1] *See, e.g., United States* v. *Siegel*, 717 F.2d 9 (2d Cir. 1983); *United States* v. *Margiotta*, 688 F.2d 108 (2d Cir. 1982), *cert. denied*, 461 U.S. 913 (1983); *United States* v. *Newman*, 664 F.2d 12 (2d Cir. 1981); *United States* v. *Bronston*, 658 F.2d 920 (2d Cir. 1981), *cert. denied*, 456 U.S. 915 (1982); *United States* v. *Von Barta*, 635 F.2d 999 (2d Cir. 1980), *cert. denied*, 450 U.S. 998 (1981).

of federal fraud statutes now covers an extremely broad range of conduct. The current breadth of these statutes makes it especially important that in fraud prosecutions courts vigilantly enforce the Fifth Amendment requirement that a person be tried only on the charges contained in the indictment returned by the grand jury. A criminal statute of broad scope creates some risk that conduct will be punishable even though the perpetrator may have doubted in good faith that his actions fell within the coverage of the statute. To that apparently tolerable risk is added a wholly unacceptable and unconstitutional risk when the prosecutor describes one type of actionable conduct in the indictment and then convicts the defendant for significantly different conduct. I believe that the RICO and mail fraud convictions obtained in this case are an egregious example of a constructive amendment of an indictment, in violation of the Fifth Amendment.

The core allegation of the RICO and the predicate mail fraud counts against Solomon Weiss was his participation in a scheme to defraud. The scheme charged in the indictment was a scheme to extract bribes and convert corporate checks. The scheme for which Weiss stands convicted, however, was a scheme to create a cash fund for his corporate employer. Since the alleged extraction of bribes and conversion of corporate funds were alleged to be in breach of the defendant's fiduciary duties to his corporate employer, the plain implication of the indictment is that the bribery and conversion were accomplished to the detriment of the corporation. However, creation of the cash fund, for which Weiss was convicted, was indisputably for the benefit of the corporation. The two schemes are fundamentally different in their nature and their effect. They may even be different in their criminality, since bribery and conversion of corporate funds

are undoubtedly unlawful, whereas creation of a cash fund for a corporation's benefit may not be. To appreciate what happened in this case one must examine first the precise terms of the indictment and then the prosecution's case as presented to the jury.

The indictment charged in Count 1 a RICO offense, 18 U.S.C. § 1962(c) (1982), accomplished through a series of mail fraud violations, 18 U.S.C. § 1341 (1982). Counts 2 through 5 alleged the mail fraud violations, consisting of the mailing of four letters in the execution of a scheme to defraud. The scheme is described in three paragraphs of Count 1, under the heading "Object of the Scheme." These paragraphs are realleged in the mail fraud counts. The first object of the scheme was that Weiss and others "did secretly and corruptly extract and accept cash bribes in return for which they caused Warner to purchase common stock in the Westchester Premier Theatre . . . thereby violating their fiduciary duties to Warner and its shareholders . . . ." Indictment, Count 1, ¶ 4. The second object was that Weiss and others "did secretly and corruptly siphon and convert approximately $221,950 in checks which belonged to Warner and its shareholders, thereby violating their fiduciary duties to Warner and its shareholders . . . ." *Id.* ¶ 5. The third object was that "in order to siphon and to convert the checks from Warner and to conceal the fraudulent conversion of those checks," Weiss and others "did cause fraudulent documents to be prepared"; the "documents represented . . . that the checks . . . were being paid to third parties for services rendered to Warner" when in fact the "services were non-existent." *Id.* ¶ 6. The scheme charged in the indictment is plainly a scheme to accept bribes and to convert corporate funds, with false check entries made to conceal the conversion. A further

paragraph of the indictment, headed "Methods and Means," details various check and cash transactions between Warner and Westchester Premier Theatre ("WPT") or persons associated with WPT.

The indictment makes no mention of a scheme to create a cash fund for Warner. It is not just a matter of omitting the precise words "cash fund." The indictment gives no indication whatever that Warner ever had a cash fund or that the purpose or effect of the scheme was to assemble a corporate cash fund. In fact, the detailed allegations of the "Methods and Means" paragraph plainly charge that Weiss, not Warner, ended up with the $170,000 cash obtained as a result of the scheme described in the indictment: "defendant, SOLOMON WEISS, secretly and fraudulently accepted a $50,000 cash bribe," *id.* ¶ 7(a); "defendant, SOLOMON WEISS, accepted $20,000 in cash," *id.* ¶ 7(c); "defendant, SOLOMON WEISS, . . . received . . . $100,000 in cash," *id.* ¶ 7(h).

At trial, the very first description of the crime that the jury heard was the following statement in the prosecutor's opening: "The government's evidence in this case will show that over a six-year period, certain high executives at Warner Communications, this nation's largest entertainment corporation, schemed to defraud the company of their duty to provide honest and faithful services to the company's stockholders *by creating a cash fund of approximately $170,000.*" (Emphasis added). The prosecutor then detailed what his evidence would be concerning what he now called "the Warner cash fund." The cash that the indictment had accused Weiss of receiving was now described as received by Weiss "on behalf of Warner."

The prosecutor's evidence detailed precisely how Weiss participated in adding cash to the Warner cash fund. His involvement began shortly after Leonard Horowitz, a stock broker interested in raising capital for WPT, approached Jay Emmett, a Warner vice-president, and offered him $50,000 in a brown paper bag as a "loan," if Emmett would buy 10,000 shares of WPT stock. Emmett declined for himself but took the proposal to Steven Ross, Warner's chairman. Ross told Emmett that Warner could not accept the loan but that Horowitz "ought to meet with Sol Weiss and maybe [h]e could be helpful in the Warner cash fund." The balance of the evidence showed just how helpful to the Warner cash fund Weiss could be.

Initially, Weiss arranged for Warner to purchase 20,000 shares of WPT stock for $150,000, and WPT kicked back $50,000 in cash to Warner and promised an additional $50,000. When WPT defaulted on its promised kickback, Weiss secured for Warner $20,000 of the anticipated $50,000 cash by issuing $50,000 of checks for non-existent services to persons associated with WPT who returned to Warner $20,000 in cash. Subsequently Weiss arranged for Warner to buy an additional 20,000 shares of WPT stock for $100,750, and WPT promised to kick back an additional $100,000 in cash. When WPT defaulted on this second kickback obligation, Weiss secured the $100,000 in cash for Warner by issuing $171,950 of checks for non-existent services to persons associated with WPT who returned to Warner $100,000 in cash. The end result was that Warner acquired 40,000 shares of WPT stock and added $170,000 to the Warner cash fund at a total cost of $472,700.

As the case was put to the jury, the District Judge made unmistakably clear that the cash fund was the

essence of the scheme to defraud. After explaining that the mail fraud offenses were offenses in their own right as well as the essential predicates of the RICO offense and that the first element of the mail fraud offenses was "the existence of a scheme to defraud," Judge Lowe said, "Now, the government contends that the fraudulent scheme was the creation of a cash fund at Warner." Then, accepting the prosecutor's shift from a bribery/conversion scheme to a cash fund scheme, the District Judge did not tell the jury that Weiss's guilt turned on whether he had extracted bribes or converted corporate funds, as the indictment alleged; instead she instructed that the jury could not convict on the RICO and mail fraud counts if "the government has not proven beyond a reasonable doubt that the cash fund alleged in the indictment existed" because "then the government will not have proven that essential element of the crime of mail fraud." Of course, the cash fund was nowhere alleged in the indictment.

What occured here is not simply a variance such as occurs when the evidence proves some facts materially different from those alleged in the indictment. *See United States* v. *Pelose*, 538 F.2d 41, 45 n.8 (2d Cir. 1976). In this case the very nature of the crime of which Weiss was convicted is significantly different from the crime charged in the indictment. That is a constructive amendment of the indictment, which violates the Fifth Amendment. *Stirone* v. *United States*, 361 U.S. 212 (1960); *see Ex parte Bain*, 121 U.S. 1 (1887).

A corporate official indicted for a scheme to extract bribes and convert corporate funds has a constitutional right not to be convicted unless a jury is told that he must be proven beyond a reasonable doubt to have ex-

tracted bribes or converted corporate funds. He cannot be convicted of a scheme to add to a corporate cash fund when the indictment against him contains no allegations of such conduct. The distinction between the scheme alleged in the indictment and the scheme for which the jury convicted is too fundamental to be ignored. The accusation that Weiss extracted bribes is plainly an allegation that he pocketed money as the price for being influenced in his job. Yet it is undisputed that he did no such thing. The Government's bill of particulars disclaimed "that Weiss kept for his own personal use any of the money he received from Horowitz." As the Government assures us, "At no time, did the prosecutor ever argue that Weiss personally enriched himself at Warner's expense." Brief for Appellee, 29 n.*. Rather than take a bribe to hurt his company, Weiss fulfilled the board chairman's hope that he could be "helpful" to his company by adding to its cash fund.[2] The essence of bribery and conversion on the part of a corporate employee is acting to the detriment of a corporation. The essence of assembling a corporate cash fund, if such be unlawful, is the breach of a fiduciary's obligation to make material disclosures, an obligation that we have held violates the mail fraud statute in this context only when it is proven that the funds were used for non-

[2] The evidence underscored just how dutiful Weiss was. Horowitz testified that he had his first dealings with Weiss at Warner's offices just moments after Emmett, as Emmett testified, had presented the first WPT proposal to Ross, who instructed Emmett to have Horowitz meet with Weiss. According to Horowitz, Weiss counted out the $50,000 in the paper bag produced by Horowitz and then said he would be back in a few minutes. When Horowitz asked whether Weiss was going to see Ross, Weiss replied that "we don't use that name around here." Weiss returned in a few minutes and increased the first transaction from a purchase of 10,000 shares and a kickback of $50,000 for the Warner cash fund to a purchase of 20,000 shares and a kickback of $100,000 for the Warner cash fund.

corporate purposes. *United States* v. *Siegel, supra,* 717 F.2d at 14.

I do not doubt that some of Weiss's conduct could have been the basis of a valid mail fraud conviction. The issuance of checks falsely prepared to reflect the performance of non-existent services is a fraud on someone, ultimately the shareholders, who are deprived of an opportunity to know how corporate funds are being spent. But Weiss was not convicted of a scheme to falsify checks. The scheme, as explained to the jury by the prosecutor and the trial judge, was a scheme to assemble a corporate cash fund. The falsification of documents, which the indictment alleged was only a means for achieving the conversion objective of the scheme that was charged, cannot on appeal become the basis for affirming a conviction that was secured when the jury found the defendant guilty of a scheme to assemble a corporate cash fund.

The various arguments advanced to excuse or mitigate the fundamental switch from the crime charged to the crime proved are unavailing. Whether Weiss was surprised or prejudiced, or was himself at fault for not objecting to the prosecutor's opening, the evidence, or the jury charge, is all beside the point because a constructive amendment of an indictment is the "[d]eprivation of such a basic right" that it cannot be "dismissed as harmless error." *Stirone* v. *United States, supra,* 361 U.S. at 217. Weiss does not complain of overreaching argument, inadmissible evidence, or an incorrect statement of the law in the charge; his point is that the notice requirement of the Fifth Amendment has been violated. It is the totality of the trial that demonstrates the correctness of his position. Nor can I accept as justification the District Court's view that the cash fund theory "simply

traced the proceeds of the illegal scheme." *United States* v. *Weiss*, 579 F. Supp. 1224, 1244 (S.D.N.Y. 1983). At trial, as the jury charge made crystal clear, creation of the cash fund *was* the illegal scheme for which Weiss was convicted. That the fund was also the proceeds of the scheme alleged in the indictment does not permit the shift from one scheme to the other.[3] Equally unpersuasive to me is the majority's slightly different explanation that the reference to the cash fund in the jury instructions was only a "short-hand expression" for the scheme charged in the indictment. — F.2d at —. Helping to raise secret cash for a corporation does not strike me as short-hand for accepting bribes.

Nor do I find the majority's invocation of prior decisions of this Court especially helpful to the effort to salvage Weiss's conviction. The majority cites *United States* v. *Heimann*, 705 F.2d 662, 665-66 (2d Cir. 1983), to show that we have been reluctant to regard an alleged shift in the Government's theory or proof as a constructive amendment of an indictment. Yet *Heimann* involved no shift at all in the theory of the crime alleged and only

---

[3] The issue might be somewhat closer if Weiss had not been charged with a mail fraud scheme, but instead had been charged with an offense directly based on obtaining the secret cash fund and then convicted for an offense directly based on possessing it. *Compare United States* v. *Gaddis*, 424 U.S. 544, 548 (1976) (receipt or possession of proceeds of bank robbery not lesser included offense within federal bank robbery provisions), *with Dove* v. *Peyton*, 343 F.2d 210, 213 (4th Cir. 1965) (receiving stolen property is lesser included offense within offense of larceny under explicit Virginia statutory provision, Code of Virginia § 18.1-107 (1950)). But even if lesser included offense concepts could be enlisted in such a situation, they provide no basis for upholding what occurred here, where a conviction that can be viewed at best as based on a scheme to funnel proceeds from wrongdoing into a cash fund was obtained under an indictment alleging a scheme to commit the wrongdoing.

the most inconsequential shift in the proof. The only shift this Court detected was a slight variation between the indictment and the proof with respect to the time when the defendant's dealings with the victims first became fraudulent. *Id.* at 666-68. In *United States* v. *Sindona*, 636 F.2d 792, 797-99 (2d Cir. 1980), *cert. denied*, 451 U.S. 912 (1981), we concluded that no prejudicial variance occurred when the core allegation of the indictment was concealment of the fact that the funds in question did not belong to the defendant and the proof showed that the concealment occurred because the funds were obtained by means of a fiduciary contract, rather than by means of embezzlement, as language of the indictment had alleged. In *United States* v. *Knuckles*, 581 F.2d 305, 308-12 (2d Cir.), *cert. denied*, 439 U.S. 986 (1978), a conviction for distribution of a controlled substance was upheld though the indictment alleged heroin and the proof showed cocaine. These cases, involving slight variances as to details, provide no support for the total shift that occurred in this case between the crime for which Weiss was indicted and the crime for which he was convicted.

I agree that Weiss's conviction on three counts of perjury should be affirmed and therefore dissent only as to the RICO and mail fraud convictions. Though this dissent is of no help to Weiss, it may enforce some protection for others if it prompts the Government in future fraud cases to think through the nature of the crime it wishes to allege and then spell out the offense in a carefully drafted indictment, instead of confronting the defendant with its theory of criminality for the first time at trial.

Opinion of the District Court

UNITED STATES of America

v.

Solomon WEISS, Defendant.

No. 81 Cr. 636 (MJL).

United States District Court, S.D. New York

Dec. 22, 1983

Rudolph W. Giuliani, U.S. Atty., S.D.N.Y. by Nathaniel H. Akerman, Asst. U.S. Atty., New York City, for United States.

Robert Kasanof and Bart M. Schwartz by Robert Kasanof, New York City, for defendant.

MEMORANDUM OPINION AND ORDER

LOWE, *District Judge.*

Presently pending before this Court are two separate post trial proceedings brought by the defendant, Solomon Weiss. The most recent is defendant's motion for a new trial on the ground of jury contamination pursuant to Rule 33 of the Federal Rules of Criminal Procedure. Also pending before this Court are previously filed motions for judgment of acquittal pursuant to Rule 29, or in the alternative, for a new trial under Rule 33, alleging *inter alia* that the credible evidence is insufficient to support a verdict of guilty on any count.

Two separate discussions follow. The Rule 29 and the Rule 33 opinion was written in May, 1983, but was not released, because of a letter received by this Court from defendant's attorney, Robert Kasanof, dated May 12, 1983 (see footnote 2 *infra*). It was the opinion of this Court upon receipt of the May 12, 1983 letter, that the issue of jury contamination should be resolved prior to final determination of the earlier Rule 29 and 33 motions.

I. BACKGROUND

The multiple count indictment filed in this case charged the defendant with racketeering, mail fraud, perjury and tax fraud. The theory of the government's case at trial was that in 1973, Weiss arranged for Warner Communications ("Warner") to purchase stock in the Westchester Premier Theater ("WPT") and in return, receive cash for a Warner "cash fund". As part of the scheme, the government argued that Weiss caused Warner to issue checks for services never actually performed by others for Warner in order to obtain money for Warner's "cash fund." The defendant denied the charges contained in the indictment.

At the conclusion of a three week trial, the jury commenced its deliberations on Tuesday afternoon, November 23, 1982, at approximately 1:45 p.m. (Tr. 1937)[1] The jury deliberated for several hours that first day, retiring for the evening at 10:00 p.m. (Tr. 1952) Deliberations resumed at 10:00 a.m. the following morning, Thanksgiving eve, and continued until 5:50 p.m. (Tr. 1954, 1980)

At the end of the second day of deliberations, at 5:50 p.m., the jury informed the Court that it was unable to reach a unanimous verdict on any count. (Tr. 1980, Court Exh. X) The defendant then moved for a mistrial. (Tr. 1980) That motion was denied. (Tr. 1984) The Court instead instructed the jury, to resume deliberations. (Tr. 1989-1990) Twenty minutes later, the jury requested that its deliberations be adjourned until after the Thanksgiving holiday. (Tr. 1992) Following the Thanksgiving recess the jurors resumed deliberations on Friday morning, November 26, 1982. (Tr. 1994) On Saturday, November 27, 1982, at 4:00 p.m., the jury returned a verdict of guilty on seven of the thirteen counts charged in the indictment. (Tr. 2056) These seven counts charged Weiss with RICO violations, mail fraud, and perjury.

On December 12, 1982, defendant submitted motions under Rule 29 or, in the alternative requested a new trial under Rule 33. After extended briefing by the defendant and the govern-

---

1 Throughout this opinion the trial transcript will be referred to as "Tr." followed by the appropriate page number. The government exhibits will be designated "GX" and the defendant's exhibits will be designated "DX".

ment, the Court held a hearing on the motion on February 23, 1983, and permitted parties to file further written submissions. Final submissions were filed on March 10, 1983.

In May of 1983, the Court was prepared to render a decision on the Rule 29 and 33 motions. However, on May 12, 1983, the Court received a letter from counsel for the defendant requesting that the court hold in abeyance its pending decision since the defendant had a new and urgent matter, the possibility of jury contamination, to bring before the Court.[2]

The Court scheduled a hearing on this claim on May 17, 1983, at which time defense counsel requested and the Court granted an *in camera* hearing on the allegations. Present at the May 17th hearing were Assistant United States Attorneys Nathaniel Akerman and Lawrence Pedowitz representing the government, and Robert Kasanof and Bart Schwartz then of

---

2 The letter of May 12, 1983 states:

"May 12, 1983

BY HAND
Honorable Mary Johnson Lowe
United States District Judge
United States District Court for the Southern
District of New York
United States Courthouse
Foley Square
New York, New York 10007
United States v. Solomon Weiss 81 Cr. 0636
(MJL) (S.D.N.Y.)

Dear Judge Lowe:

I am writing to request a meeting at Your Honor's convenience on Thursday, May 19th so that we may present to the Court matters which we believe are of major importance and may impact motions which Your Honor now has under consideration but are directed at matters which have just come to light and which have not yet been brought to the Court's attention.

We ask for May 19th so that we may be fully prepared to make a presentation to Your Honor so that Mr. Weiss' appellate counsel, Mr. Leon Silverman, will be able to be present.

We represent to the Court that the matters we seek to raise are of sufficient importance and sensitivity as to make a conference with the Court necessary and appropriate.

Respectfully submitted,
Robert Kasanof

cc: Nathaniel Akerman, Esquire (By Hand)
Leon Silverman, Esquire."

the law firm of Kasanof and Schwartz representing the defendant. Also present was Leon Silverman, who is of counsel to Kasanof and Schwartz.

Mr. Kasanof informed the Court that extra-record evidence had been presented to the jury during their deliberations which may well have contaminated those deliberations. Mr. Kasanof then read from the trial transcript of November 26, 1982 (page 1998, lines 13 to 20), which was a proceeding after the court had received a note from the deliberating jury (Court Exh. Y). The transcript was as follows:

> THE COURT:
>
> [Reading the note from the jury] The jury has been directed to use its best unbiased judgment and common sense in reaching a verdict on a series of counts outlined to us. Our ability to do this fairly is dependent upon our varied, collective experiences. Most of us are unfamiliar with the nature of the training of a CPA. Underlined. "Mr. Weiss is a CPA." Question, period, for question: Is this jury entitled to know what a CPA is, as opposed to a bookkeeper, lawyer versus legal aid[e], M.D. versus paramedic, dentist versus dental tech." A line is drawn and under the line is: "Re underlined (Xerox), sentences, Meigs and Meigs.["] "_____, J3," and signed by our foreperson.

Mr. Kasanof informed the Court that he had identified a standard set of accounting textbooks which were authored by *Meigs* and *Meigs*,and which also discuss the "understanding or required understanding of a CPA. . ."[3] Mr. Silverman reported to the Court that he had been reliably informed by someone that an accounting text had been brought into the jury room during deliberations. This person indicated to Mr. Silverman that a magazine reporter had interviewed several jurors in the case who in the course of the interviews stated that "a text, an accounting text had been brought into the jury room." (Hr. I, 7) On a later occasion, Mr. Silverman continued, he spoke with the same reporter who stated that his research indicated that, although the textbook had not been

---

3 Transcript of May 17, 1983, hearing (Hr. I at 5-6).

brought into the jury room, a copy or excerpt from the book was present during the deliberations. (Hr. I, 8)

Mr. Kasanof then marked the textbook *Meigs & Meigs, Financial Accounting*, as an exhibit and read into the record the following from page 6. (Hr. I, 11-12)

> Certified public accountants are independent professional persons comparable to attorneys or physicians who offer accounting services to clients for a fee . . . The principal function of a CPA is auditing. How do people outside a business entity, owners, creditors, government officials and other interested parties know that the financial statements prepared by the company's management are reliable and complete? In large part these outsiders rely upon audits performed by a CPA firm which is independent of the company issuing the financial statements.

Defense counsel stated that the jurors either had the excerpt from the book or it was read to them for the purpose of indicating that a CPA had a greater degree of responsibility and learning than a bookkeeper.

Mr. Kasanof then submitted a list of cases and made a motion that the Court inquire of the jurors concerning the alleged extra-record evidence. After a short recess and further discussion, the Court granted the government's request to adjourn the proceeding for briefing and set the matter down for May 20, 1983, for a decision on defense counsel's application. On application of Mr. Kasanof and with no objection from the government, the record was sealed. At the May 20, hearing the Court ruled that an inquiry of all the members of the jury would be conducted beginning on May 25, 1983, and also at that time, a conference would be held for both sides to work out the mechanics of the questioning.

At the inquiry, the Court questioned Juror #3, the author of the jury note, Court Exh. "Y", who stated that when he came to the deliberations on November 26, he brought with him a basic text on bookkeeping and had xeroxed a page of the book.[4] Juror #3 explained that neither the book nor xerox was

4 Court's Voir Dire on May 25, 1983 (Hr. II) page 26.

brought into the jury room. (Hr. II, 27) However, Juror #3 testified that from his reading of the book, he explained to the jury what kind of training an accountant has, and specifically, how such training differs from the training of a bookkeeper. (Hr. II, 27-28) When asked by the Court to explain his reasons for what he did, Juror #3 stated that:

> One of the key aspects of deciding whether or not Mr. Weiss was guilty rested on the argument of whether or not one can reasonably expect him to know certain kinds of things. The understanding that Mr. Kasanof would have had us to accept was that . . . (Mr. Weiss) was just following the kinds of things that a bookkeeper or accountant does without really having a good grasp of the significance of it. . . . And if the man was functioning as a bookkeeper then one might accept that, I suppose. But . . . to me what is important, to me the man is trained as a CPA. . . (Hr. II, 32-33)

Juror #3 further testified that:

> When you have a CPA (in contrast to a bookkeeper) you're (sic) trained different . . . I felt that was important for people to understand that because we're trying to decide what Mr. Weiss knows and what it is that we can reasonably expect him to know and what you can reasonably expect of him is different for a CPA than it is for a bookkeeper. [Hr. II, 28]

In response to the Court's written inquiry to Juror #3[5] asking him to indicate those portions of the text that he explained to the jury, he responded with the following letter to the Court:

> "Your Honor:
>
> At some point during the trial the nature of the defendants education was discussed. It was indicated that Mr. Weiss was a CPA. Neither lawyer disagreed with this. CPA—this is not 3 randomly selected letters, it is not

5 See letter from Court dated June 3, 1983.

XYZ. CPA abbreviates CERTIFIED PUBLIC ACCOUNTANT. Certified by who to do what? What is his job? For what may he be held accountable as a CPA? A lawyer can be disbarred, a medical doctor can have his license revoked. What can happen to a CPA?

I have bracketed the quote I recited to the jury on page 7. My note which you asked if I had written, may also have mentioned another page but I believe I didn't bother with it. For me own edification I read pages 6, 7, 8 and perhaps a few other pages at home—not at the court house.

We were to use our best judgment, experience, etc. in evaluating the evidence presented. No one said I could not inform myself of the training and skills of a CPA. Having done so, that is my experience. The quote is a definition. It is in no way directed toward either the prosecution or the defense. Since I could not get the page entered in a formal way, it was presented as my opinion—carrying no more weight than anyone else's opinion. The argument among jurors was going on before the quote, and continued (sic) to the end of the deliberations. The other jurors were not willing to let me rephrase the question so I dropped the issue and left it as my own opinion.

Respectfully,"[6]

In addition to the testimony of Juror #3, at least six other jurors of the twelve were interviewed by the Court, seven had some recollection of the note in question (Exhibit "Y").[7] The knowledge of these six ranged from a simple recollection that the note was written, to a specific recollection of the conversations that lead up to and followed the writing of the note. On June 1, 1983, the Court questioned the marshall who was assigned to the jury deliberations on November 26, a Mr. Richard McHale. Marshall McHale testified that he neithe

---

6 See letter from Juror #3 dated June 2, 1983.

7 The six jurors were juror numbers 2, 5, 8, 9, 11 and 12.

recalled seeing an accounting book in the jury-room, nor recalled any juror asking that he give to the Court a book or xeroxed pages of a book.[8] On June 29, 1983, following several hearings on this matter, defense counsel filed a motion for a new trial pursuant to Rule 33, on the ground of jury contamination. On July 7, 1983, the government filed its opposition to the latest motion, and final submissions were made on July 14, 1983. Given the sensitive nature of the proceedings and at the request of counsel all of the records pertaining to the jury inquiry were sealed.

II. EVIDENCE PRESENTED AT TRIAL

Because the jury contamination question required this Court to look at the entire trial record, (see legal discussion pages 1236-1237 *infra*), what follows is a detailed examination of the evidence presented at trial. The record before the Court is both lengthy and complicated. For purposes of clarity and organization this opinion relies on both parties' summations in its review of the record.

In his summation, Assistant United States Attorney Nathaniel H. Akerman (AUSA Akerman) stressed three factors which he claimed proved Weiss' guilt: (1) the direct testimony of accomplices, (2) the undisputed evidence of his signature on the documents in question, and (3) evidence suggesting that Weiss committed forgery.

1. *Testimony of Horwitz and Emmett (The Accomplices)*

As defendant's counsel stated in his summation, the question before the jury was a "relatively sharply drawn issue" (Tr. 2050) as to whether the jury believed the government's witnesses, Jay Emmett and Leonard Horwitz, or the defendant. The testimony of Emmett and Horwitz, the government argued, proved that Weiss negotiated with Horwitz for cash, accepted cash from Horwitz, made false entries in Warner's

8 Hearing of June 1, 1983 pages 7 and 8.

records and caused false documents to be created knowing that it was for a secret cash fund.

Horwitz testified that sometime in May 1973, the Westchester Premier Theater ("WPT") was in the process of selling stock for a public offering. (Tr. 130) During the course of this offering, Elliott Weisman, the president of WPT, asked Horwitz, a friend of Emmett to approach Emmett about purchasing 10,000 shares of WPT stock for $75,000. (Tr. 138) Under the deal offered by Weisman, the theater would loan Emmett $50,000 toward the purchase price of the stock. (Tr. 138)

Horwitz subsequently met with Emmett at the Warner office and carried with him, in a brown paper bag $50,000 received from Weisman. (Tr. 140) Emmett testified that after hearing Horwitz' proposal, he declined his offer because he had already bought 10,000 shares of seed stock in the WPT for a lower price and did not wish to buy anymore. (Tr. 680) He suggested, however, that Warner might be interested in the offer. (Tr. 681) Emmett left Horwitz to go talk to Steven Ross, Chairman of the Board of Warner. (Tr. 681) According to Emmett's testimony, Ross stated that Warner could not take a loan to buy stock in a public company, but suggested that Horwitz meet with Sol Weiss,[9] and that maybe Horwitz could help with the Warner "cash fund". (Tr. 681) Emmett then contacted Weiss and told him of his conversation with Ross. (Tr. 682) Thereafter, Emmett introduced Weiss to Horwitz and left the two to discuss the matter. (Tr. 682)

Horwitz testified that he proposed to Weiss the same deal that he had offered to Emmett. (Tr. 143) Weiss indicated that the company would be interested since it always had a need for cash. (Tr. 143) Weiss then counted the cash in the paper bag, excused himself and started to leave the room. (Tr. 144) Horwitz asked Weiss if he was going to see Ross and Weiss responded that Ross' name wasn't to be used. (Tr. 144) Five to ten minutes later, Weiss returned and made a counteroffer. He

---

9 Defendant Weiss was at that time an officer of Warner with the title of Assistant Treasurer. (Tr. 1454)

proposed that Warner would buy 20,000 shares of stock, provided that WPT give Warner $100,000 in cash as payment for Warner buying the stock. (Tr. 144) Horwitz phoned Weisman, secured his approval, and accepted Weiss' offer. (Tr. 145) The $50,000 in cash in the bag was then turned over to Weiss with the promise that the additional $50,000 would be forthcoming. (Tr. 146)

II. *Undisputed evidence of Weiss' signature on the documents in question.*

On May 30, 1973, Warner purchased 20,000 shares of WPT stock. The request for check[10] was prepared and initialed by Weiss. (GX 1) The request for check was also approved by Bert Wasserman[11] and contained the writing "O.K. per Jay Emmett". Pursuant to this request, a check was mailed to the brokerage firm handling the transaction. (GX 2) Horwitz testified that following the stock purchase, Weiss asked Horwitz for the $50,000 in cash that was still due Warner pursuant to their agreement. (Tr. 150) Horwitz informed Weiss that WPT did not have that amount of money in cash, and Weiss modified his original deal with Horwitz. Instead of $50,000 in cash, Weiss instructed Horwitz to deliver to him $20,000.[12] (Tr. 151) At the same time Weiss agreed to issue two Warner checks totalling $50,000 to WPT representatives for non-existent services. (Tr. 151)

Horwitz testified that on the same day that he delivered the $20,000 in cash to Weiss, Weiss in return gave him two checks; one for $30,000 made payable to the WPT and the second for $20,000 made payable to Horwitz. (Tr. 153) Both checks were

---

10 A "request for check" is a standard corporate form which must be furnished with an approval signature on it before a check is issued.

11 Wasserman was at that time a vice president and comptroller of Warner. (Tr. 1314-1315)

12 Horwitz testified that he obtained this $20,000 in cash from Norman Brodsky, a member of the law firm Konner & Brodsky. (Tr. 152) GX 19 shows that on July 3, 1973, the account of the law firm was overdrawn by $24,231.90.

signed by Jay Hardy, an employee of Warner. (GX 8 and 15) Horwitz took the $20,000 check and opened an account at Bank Leumi. (Tr. 154, GX 10 is the record of that account) After depositing that check, Horwitz withdrew $9,900 to give to Elliot Weisman. (Tr. 153, GX 12 is a check for cash in the amount of $9,900) Horwitz delivered to Weisman the $30,000 check made out to WPT. (Tr. 156) However, Weisman would not accept the check since it was made out to WPT and would therefore be accountable on its books and records. (Tr. 157) Horwitz returned this check to Weiss, who then voided it by tearing off the signature. (Tr. 157, GX 17) Horwitz and Weiss agreed that a $30,000 check payable to Dennis Konner of Konner & Brodsky would be issued to replace the original check to the WPT. (Tr. 158)

Horwitz further testified that to make it appear that actual services had been provided to Warner by Konner, Weiss directed him (Horwitz) to prepare a false backdated invoice purportedly from Konner. (Tr. 159-161) As Weiss' July 5, 1983 letter to Horwitz stated:

> "Dear Len:
>
> I am still awaiting a bill from Dennis Konner, Esq. for the services rendered up to date. I do not want to hold him up any longer now that Jay has agreed to the fee.
>
> Very truly yours,
>
> Solomon M. Weiss"

[GX. 39]

On July 26, 1973, Weiss prepared a request for check payable to Konner for fees re: cable consultation. (GX. 43) On that same day a check for $30,000 was made out to Konner from Warner and signed by Weiss. (GX. 44)

On October 23, 1973, Weiss wrote another letter to Horwitz:

Dear Len:

As a reminder, I have not received the bill for the legal services that you indicated you would get for me.

Very truly yours,

Solomon M. Weiss

[GX. 48]

III. *Evidence relevant to the forgery and perjury charges*

Horwitz testified that after he received the October 23, 1973, letter, he prepared the Konner bill for non-existent legal services. (Tr. 162, GX 49) Since the Warner check to Konner for $30,000 was dated July 26, 1973, and the second letter to Horwitz regarding a bill for legal services was dated October 23, 1973, Horwitz at Weiss' request, back-dated the Konner bill to July 11, 1973, so that it would appear as though this bill had been submitted on a timely basis. (Tr. 163)

In addition, the Konner bill bears the signature "J. Emmett", AUSA Akerman argued in his summation that the signature was forged by Weiss. At trial the government offered the testimony of handwriting expert Ms. Pearl Tytell. Ms. Tytell identified the signature on the Konner bill as a signature written by Weiss. (Tr. 463) She testified that there were enough characteristics in the writing of "J. Emmett" on the bill to match the characteristics in the handwriting of Weiss for her to form an expert opinion. (Tr. 465-7)[13] AUSA Akerman argued in summation that the signature looked like Weiss' handwriting, that Weiss was the only person who wrote the name "J. Emmett" without spelling out J-A-Y, and that all of the handwriting experts who testified in the case agreed that the signature which appears on the bill is not the signature of Jay Emmett. (Tr. 1678)

---

13 Furthermore, handwriting experts for the defense acknowledged that although there were not enough characteristics in this particular exhibit to identify it as Weiss' handwriting, Weiss could have written the signature.

At trial, Weiss testified that he wrote the letter of October 23, before he realized that the company had received the Konner bill and that in the interim, Emmett had instructed him to issue the $30,000 Konner check. (Tr. 1462, 1464) Weiss explained that he wrote both the letters to Horwitz because he was instructed by Emmett to obtain the bill for legal services owed to Konner for work on the Television Communication Company ("TVC") acquisition by Warner. (Tr. 1460)

This explanation by Weiss is contrary to his grand jury testimony on April 10, 1978. Weiss testified before the grand jury that he prepared the July 26, 1973, check request from the July 11, 1973 Konner bill.[14] In addition, Weiss denied to the grand jury that there was any connection between Horwitz and the bill from Konner.[15] AUSA Akerman on summation, explained these discrepancies arguing that when Weiss testified before the grand jury on April 10, 1978, he had no reason to believe that Horwitz, who was then an employee of Warner, would turn over to the government the letters dated July 5, 1973 and October 23, 1973. (Tr. 1681-1682)

IV. *The Second Stock Purchase*

Shortly after the close of the public offering of WPT stock, Horwitz testified that he entered into a second transaction with Weiss, for Warner to buy an additional lot of WPT Stock. (Tr. 167) Warner was to purchase $100,000 worth of WPT Stock and in exchange receive $100,000 in cash when the theater opened in March of 1974. (Tr. 167-68) The $100,000 that WPT was to pay to Warner was to come from the sale of theater tickets. The government offered GX 40 and its attachments as evidence that Weiss approved this purchase.[16] (Tr. 1550-1551) The letter which transmits the check for the purchase of this stock, lists five names on the lower column indicating those

---

14 Grand jury minutes April 10, 1978, page 18.

15 Grand jury minutes, April 10, 1978, page 31.

16 On each of the four stock confirmations attached to the exhibit is found "O.K." and the initials of Solomon Weiss.

persons who received blind copies of the letter. (GX 40) Weiss' name heads the list.

On summation, AUSA Akerman contended that Weiss' name was the only one on the list that did not make sense in the normal course of Warner business. (Tr. 1686) Weiss was in charge of the personal finances of Warner's top executives. (Tr. 1454) It was therefore unusual for Weiss to be involved in any purchase of stock for Warner's stock portfolio. It was rather, Bert Wasserman, who had this corporate responsibility. (Tr. 1315) In addition, not once prior to and not once since that occasion did Weiss' name ever appear on any documents for stock purchases. (Tr. 1687)

Horwitz testified that in late 1973 it became apparent the WPT would open at a much later date than previously planned and as a result, the understanding for the second stock purchase was altered. (Tr. 170-173) Weiss agreed to issue Warner checks to the WPT for $150,000, and the theater in exchange would return to Warner $100,000 of the proceeds of the checks. (Tr. 173-176) Pursuant to this new agreement, Weiss wrote the following memo to Mr. Hardy of the accounting department: "It is most likely that we will be signing a cable option with the WPT in the month of November and we will need $150,000 or some part of that. I cannot tell for certain when, but probably the 3rd week of November." [GX 50] It was ultimately decided that Warner would issue the checks to Horwitz and Bruce Kosman ("Kosman")[17] and Horwitz in return, would deliver the cash to Weiss. (Tr. 173-176).

V. *Evidence of The Transactions*

Horwitz testified that before either Kosman or Horwitz received any Warner checks in relation to the second stock purchase, he (Horwitz) gave Weiss the name Albert Bzura, as a name to use in the scheme. (Tr. 174) On December 27, 1973, a check for $40,000 was made payable to Bzura from Warner.

17 Kosman was brought into the scheme because of his favorable tax situation, i.e. a carry-over loss that he had which would permit him to take a tax deduction for these particular checks. (Tr. 173-74)

(GX. 51) This check was cancelled because Bzura was unwilling to deliver the cash to Weiss prior to receiving the check. (Tr. 175) On January 10, 1974, Weiss wrote an interoffice memorandum asking that the $40,000 check be cancelled. (GX. 53)

Horwitz testified that pursuant to Warner's second stock purchase, between 1974 and 1977, Weiss arranged for Warner to issue ten checks to Horwitz and Kosman. (Tr. 175) There was no legitimate work done for any of these checks. (Tr. 175) Horwitz stated that he delivered $100,000 in cash to Weiss at Warner in exchange for the checks. (Tr. 175-176) Horwitz testified that the established pattern of operation for this scheme was for Horwitz to first deliver the cash to Weiss and then receive the checks from Warner. The evidence of each of these transactions was as follows:

(1) On January 14, 1974, a request for check was prepared by Weiss for payment of $30,000 to Kosman for consulting fees re: Jungle Habitat. (GX 55) Pursuant to this request, a check was issued to Kosman on January 16, 1974. (GX. 58)

(2) On January 14, 1974, a request for check was prepared by Weiss for payment of $10,000 to Horwitz for consulting fees re: Jungle Habitat. (GX. 62)[18] Pursuant to this request a check was issued on January 16, 1974, to Horwitz. (GX. 63)

In support of Horwitz' testimony the government offered into evidence Weiss' desk calendar that indicated that Weiss had met with Horwitz on January 15, 1974, at 9:30 in his office. (GX 55A) In addition, documentary proof was offered that on January 15th and 16th he and his cousin Seymour Niesen obtained through two bank loans for $20,000 in cash.[19] (Tr. 182-186) Horwitz testified he later delivered this $20,000 in cash to Weiss.

To complete the transaction, on January 18, 1974, Horwitz received $20,700 from Kosman.[20] Horwitz stated that he took

---

18 The request for checks indicated that the checks to Kosman and Horwitz were to replace the cancelled check to Burza.

19 See, GX 56, 57.

20 GX. 69 is a check for cash in that amount drawn against Kosman's account.

$15,700 of that amount along with Horwitz's own personal check in the amount of $5,000,[21] to reimburse his cousin, Niesen the $20,000 plus he gave Niesen $700 for his help.

On summation AUSA Akerman asked the jury to consider notations on the remittance advices[22] for Warner's January 16, 1974 checks to Kosman and Horwitz. From these remittance advices it appears that on February 11, 1974, there was written "Sol ? Al" on the form. Mr. Albert Sarnoff, treasurer of Warner, questioned Weiss about the propriety of the checks for $40,000 since the documentation for the two checks only bore Weiss' approval, and Weiss' handwriting indicated that these checks were related to real estate consulting fees. (GX 54, 55, 62) Weiss apparently gave Mr. Sarnoff a satisfactory answer. (Tr. 1564-5) AUSA Akerman explained that Mr. Sarnoff, as head of real estate for Warner, had a good reason for questioning Weiss about these checks. (Tr. 1694) After this questioning, AUSA Akerman argued, Weiss was careful in the future and had other Warner officials approve these payments for non-existent services, to insure that no further questions were asked by Mr. Sarnoff or anyone else. (Tr. 1694)

(3) On March 28, 1974, Weiss prepared another check request for Horwitz in the amount of $10,000 as payment for a consulting fee. It was approved by Caesar Kemmel, an executive of Warner. (GX. 72) The check request had instructions written on it directing that the check was to be drawn on April 1, 1974. Horwitz testified that before he received this check he delivered $5,000 in cash to Weiss. (Tr. 192)

(4) On January 14, 1975, Horwitz and Niesen again went to a bank where Niesen borrowed $15,000. (GX 77) Sometime between January 15th and 17th, Horwitz testified he delivered this $15,000 in cash to Weiss. (Tr. 198) In return: on January 15, 1975, Weiss prepared a request for check in the amount of $25,000 to Horwitz for consulting fees. (GX 78) The request

---

21 Tr. 189 GX. 67 is Horwitz's check to Niesen for $5,000.

22 A remittance advice is the corporate file copy of an issued corporate check.

indicated that it was "approved" by "J.E." the request also stated that the prepared check was to be delivered to Weiss. A check was made out to Horwitz on January 15, 1975. (GX. 79) Horwitz stated that he took this check, and deposited it into his bank account. (Tr. 199 GX. 83) Then using a number of personal checks, Horwitz repaid his cousin the $15,000 he had borrowed. (Tr. 199-200 GX 83-87)

Horwitz testified that in 1976, Weiss asked him to prepare a feasibility study as a coverup for subsequent checks. (Tr. 224-225) Pursuant to this arrangement, Weiss sent Kosman a copy of reports on a feasibility study which already had been prepared for Warner by Zorn Industries.[23] Horwitz, Weiss and Kosman then visited the site of the subject of these reports, Jungle Habitat, in order to give further credence to the study. (Tr. 230) Documents from Warner's files disclosed that Kosman presented to Warner an almost identical copy of the original Zorn report representing that it was his original work. (GX 129, 130A-130J)

(5) On August 20, 1976, a bill for $7,682.50 from Kosman was submitted to Warner and was approved by Emmett. (GX. 91) Horwitz testified that on August 20, 1976, he delivered to Weiss $5,000 in cash which he had received from Kosman. (Tr. 233)[24] In connection with this transaction: a check from Warner to the Kosman Agency in the amount of $7,682.50 was issued on August 19, 1976. (GX 93) Weiss' name is nowhere on the check. The back of the check shows that it was cashed on August 24, 1976. (GX. 96)[25]

(6) On September 1, 1976, another bill from the Kosman Agency was mailed to Warner and was approved by Emmett. (GX. 100) This bill was for the amount of $15,344.20. On

---

23 GX. 88, 89, 90 are cover letters signed by Weiss which accompany the materials for the reports.

24 GX 92 is a personal check drawn against Kosman's account for $5,000 cash.

25 GX 99 is a bank photograph of Kosman and Horwitz at the bank where, and on the date when, the check was deposited.

September 8, 1976, Kosman cashed a check for $9,500 to give to Horwitz. (GX. 101) Horwitz testified that Kosman gave him another $500 totalling $10,000 which he delivered to Weiss. (Tr. 237-38) Pursuant to the bill for $15,344.20, a check from Warner payable to Kosman Agency dated September 7, 1976 was drawn in the amount of $15,344.20. (GX 102) Weiss' signature does not appear on the face of this check.

(7) On October 4, 1976, another Kosman Agency bill was submitted and approved by Emmett. (GX. 106) The amount of the bill was $15,342.60. A check was made payable to Kosman in the amount of this bill and dated October 7, 1976. (GX 107) Weiss' name does not appear on the check.

(8) A bill from Kosman for $15,294.40 was received by Warner and dated January 3, 1977. (GX. 110) Pursuant to this bill Warner issued a check payable to Kosman in the amount of the bill and dated January 7, 1977. (GX. 111) Weiss' name does not appear on the check.

(9) Warner was billed $23,287.00 by Kosman on February 23, 1977, and on the face of the bill is Emmett's written approval. (GX. 114) Warner issued on February 25, 1977, a check payable to Kosman for $23,287.00. This check was signed by two persons, neither of which was Weiss. (GX. 115) Horwitz testified that he received the check in transaction #9 before he delivered the cash ($15,000) to Weiss. (Tr. 260)

(10) From June 3rd to June 10th, 1977, Horwitz through various means, gathered $10,000 in cash which he testified that he delivered to Weiss. (Tr. 266, GX 118, 119, 120) On June 9, 1977, Weiss prepared another request for check to Horwitz in the amount of $20,000. (GX 121) It contains Emmett's written approval and the notation that it was a payment made in connection with the termination fo the Jungle Habitat survey conducted by Horwitz. A check from Warner for the amount of the bill was made payable to Horwitz and dated June 10, 1977. (GX 122) Horwitz testified that after he deposited this check into his account, he reimbursed Niesen for at least $3,000.00 of the money that he borrowed from him in order to deliver the $10,000 cash payment to Weiss. (Tr. 270)

VI. *Evidence Presented By The Defense.*

In response to the government's case, Weiss' defense stressed the implausibility of the government's theory, the inconsistent testimony and bias of the government's witnesses, and the credibility of Weiss' testimony.

In his summation to the jury, Mr. Kasanof argued that Emmett was the key to this entire case. (Tr. 1766) Emmett testified that in 1979 he plead guilty to stock fraud and the government did not pursue its right to forfeit his stock in Warner. Emmett thereby retained 145,000 shares of Warner stock which were valued at the time of trial at about 7 million dollars. Mr. Kasanof argued that before Emmett falsely testified against Weiss, Emmett negotiated a deal with the government. Further, the only thing that Emmett could offer to the government that was worth seven million dollars was a story that would incriminate Weiss, "with an option on Ross." (Tr. 1778)

In addition, Mr. Kasanof argued that Emmett had a strong motive to see that WPT stock was bought by Warner since he already owned a fair amount of seed stock. (Tr. 1731) Mr. Kasanof argued that Emmett, as a man with an admitted high and flamboyant life style, had good and sufficient reasons to want to make money through such a scheme. (Tr. 1766, 1772) Given that Emmett's opportunity and motives to engage in these illegal transactions were so apparent, Mr. Kasanof claimed that Weiss was brought into the scheme unwittingly, so that Emmett could distance himself from the operation. While it might have been possible to believe Emmett's story despite his obvious motives to lie, Mr. Kasanof contended, the testimony of Arthur Liman, a respected lawyer in both the private and public sector, proved that Emmett's testimony implicating Weiss in this scheme lacked credibility.[26]

Mr. Kasanof also stressed Horwitz' motives to lie. Horwitz, Mr. Kasanof argued, as part of his plea bargain, falsely

---

26 A collision of oaths between Liman and Emmett resulted when Liman testified that, contrary to Emmett's testimony, he never requested that Emmett loan Horwitz $100,000 so that Horwitz could pay his legal fees. (Tr. 1196-99)

incriminated Weiss in order to receive less jail time for his offenses. (Tr. 1760) In addition, Mr. Kasanof suggested that Horwitz was Emmett's friend of long standing and therefore told a story to the government to substantiate Emmett's statements that incriminated Weiss. (Tr. 1766) An example of Horwitz's false testimony against Weiss, Mr. Kasanof argued, was his testimony that before he received the checks from Weiss dated September 7, 1976, he delivered the cash to Weiss. (Tr. 237-38) It was uncontroverted on the record that Weiss was in California between September 6th-9th, and could not have been available to receive the cash payment from Horwitz.[27] Mr. Kasanof contended that Horwitz' credibility was also undermined by the testimony of Michael Armstrong, a well respected attorney. (Tr. 1399)[28]

At trial, Weiss testified that he was a CPA. (Tr. 1507) In addition he testified as to his educational and employment background and his duties at Warner. That evidence revealed that Weiss, fifty-three years old, graduated from City College of New York in 1950 with a Bachelor of Science degree and later recieved a masters of business administration degree from Rutgers University. (Tr. 1451) From the early 1950's to 1962 Weiss worked as a public accountant for a public accounting firm. (Tr. 1450-52) In 1962, Weiss was employed by the company which later was known as Warner. Initially, Weiss worked in the company's accounting department, and in 1970 was elevated to Assistant Treasurer and Vice President. Because of ill health he dropped his responsibilities as a Vice President but continued as the Assistant Treasurer. (Tr. 1453-54)

As Assistant Treasurer, Weiss oversaw the personal finances of Warner's top executives including the Chairman of the Board. He conducted tax and financial planning for these

---

27 Weiss produced at trial evidence of airline tickets, expense accounts and car rental bills to prove that he was in California on those dates. (Tr. 1443-49 GX 361, DX R).

28 A memorandum prepared by Mr. Armstrong for Warner, after Mr. Armstrong met with Horwitz' lawyer suggested Horwitz' willingness to lie and incriminate others in order to obtain a favorable deal from the government. (Tr. 1399-1400 DX Q.)

executives, proposed investment opportunities for them, advised them in their financial matters and assisted them in preparing their tax returns. Weiss also maintained the books and records of the New York Cosmos, the soccer team owned by Warner. From 1973 to 1977 Weiss' annual compensation from Warner went from $55,000 to $122,791. (Tr. 56, 83-4, 683, 844, 943, 1067, 1068, 1069, 1115-6, 1177, 1185, 1282-3, 1321, 1454, 1469, 1505-10, 1517-20, 1526; DX I)

In his own defense, Weiss testified that although he undeniably signed his name to the documents in question, he was unaware of either an illegal scheme to sell WPT stock or a plan to establish a Warner cash fund. (Tr. 1434-1436) As proof of his credibility, Weiss offered the testimony of character witnesses who testified that Weiss enjoyed a reputation for being honest and that they personally believed he was honest. (Tr. 1267, 1310)

At trial Weiss' secretary, Linda Horns, testified that in 1973, Weiss dealt with Horwitz on Warner's investment in the WPT. (Tr. 57) In addition, Ms. Horns stated that during that time Horwitz came by twice a week, and telephoned Weiss four or five times a week. (Tr. 58, 59) Weiss' testimony acknowledged that Ms. Horns' statements were true, but explained that Horwitz frequently visited his office because Horwitz was a constant pest who tried to get financing for various schemes. (Tr. 1486)

On summation Mr. Kasanof contended that if Weiss was guilty of the offenses he was charged with (coordinating a sophisticated scheme to establish a Warner cash fund), he would never have left a written trail that the government could use to tie him to the scheme. (Tr. 1798) Instead, Weiss would have used the telephone to ask Horwitz to send in phony legal services bills.[29] Mr. Kasanof also argued that this same logic should be applied to the evidence of the cancelled Bzura check and the subsequent checks to Kosman and Horwitz that replaced this cancelled check. For Weiss to have clearly indicated

---

29 Weiss admitted that he wrote two letters to Horwitz in 1973, which requested that Weiss be sent a bill for legal services provided to Warner. (Tr. 1459, 1462)

on the two checks that they replaced the Bzura check meant, according to Mr. Kasanof, that Weiss felt no need to hide these transactions since he assumed that they were legitimate. (Tr. 1798)

On instructions from the government, Emmett taped a conversation with Weiss. (GX 206) In this conversation Emmett did not elicit admissions of guilt from Weiss. However, Weiss did not deny any involvement in the scheme, but rather answered Emmett's comments and questions with silence. Mr. Kasanof argued that Weiss' silence on the tape suggested his innocence rather than his guilt. (Tr. 1803) Mr. Kasanof also contradicted the government's assertion that Mr. Sarnoff's questioning of Weiss and Weiss' satisfactory answer proved Weiss' guilt. (Tr. 1728) Rather, Mr. Kasanof maintained that when Weiss was questioned by Mr. Sarnoff about the checks to Kosman and Horwitz, Weiss simply explained the truth as he then understood it, i.e., that these expenses were approved by Emmett.

Weiss denied at trial that he forged Emmett's signature. (Tr. 1459) On summation Mr. Kasanof argued that his client must have been telling the truth when he stated that he did not commit forgery, becuase if Weiss and Emmett were in these schemes together, Weiss would have no need to forge Emmett's name. (Tr. 1730) All Weiss had to do, Kasanof stated, was to ask Emmett to approve the bills submitted by Horwitz, Konner and Kosman.

There was no doubt that Weiss' testimony before the grand jury in 1978 differed from his testimony at trial on certain matters. However, Mr. Kasanof argued that these discrepancies were easily understood given Weiss' lapse of memory[30] and the different nature of the proceedings. Moreover, Mr. Kasanof contended that if Weiss was a dishonest accomplice he would have made sure to keep his testimony consistent at both proceedings. (Tr. 1801)

---

30 A memory expert testified that such a memory lapse was not indicative of willful lying. (Tr. 1621)

III. LEGAL DISCUSSION

It is a fundamental precept of our criminal justice system that the " 'conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence.' " Bulger v. McClay, 575 F.2d 407,408 (2d Cir.) (Kaufman, J.) cert. denied, 439 U.S. 915, 99 S.Ct. 290, 58 L.Ed.2d 263 (1978) quoting Patterson v. Colorado, 205 U.S. 454, 462, 27 S.Ct. 556, 558, 51 L.Ed. 879 (1907). That principle is grounded in the defendant's rights of confrontation and cross-examination, which are fundamental requirements of a constitutionally fair trial. *Parker v. Gladden*, 385 U.S. 363, 365, 87 S.Ct. 468, 17 L.Ed.2d 420 (1966).

Because of the importance of these rights, the Second Circuit has recognized that "extra-record information that comes to the attention of a juror is 'presumptively prejudicial.' " *United States v. Hillard*, 701 F.2d 1052, 1064 (2d Cir.), *cert. denied*, ____ U.S. ____, 103 S.Ct. 2431, 77 L.Ed.2d 1318 (1983) *citing Remmer v. United States*, 347 U.S. 227, 229, 74 S.Ct. 450, 451, 98 L.Ed. 654 (1954). However, the presumption may be rebutted by an affirmative showing on the part of the government that the information is harmless. *United States v. Hillard, supra*, at 1064. As the Second Circuit stated in *United States ex rel. Owen v. McMann*, 435 F.2d 813, 818 (2d Cir. 1970), *cert. denied*, 402 U.S. 906, 91 S.Ct. 1373, 28 L.Ed.2d 646 (1971): "The touchstone of decision in a case such as we have here is thus not the mere fact of infiltration of some molecules of extra-record matter, . . . but the nature of what has been infiltrated and the probability of prejudice."

In assessing the "probability of prejudice", the Court must look to the entire trial record; "[s]uch an analysis requires a careful examination of the substance of [the extrinsic evidence] . . . and of the other information of which the jurors were properly aware." *Sher v. Stoughton*, 666 F.2d 791, 794 (2d Cir. 1981). If the Court finds that there is "abundant properly admitted evidence" concerning the matter to which the extra-record information is relevant, the Court may properly con-

clude that the infiltration of such information was non-prejudicial. *United States v. Hillard, supra*, at 1064; *Sher v. Stoughton, supra*, at 793-94.

In support of his motion, the defendant argues that he suffered severe actual prejudice as a result of the jury having extra-record evidence. Defendant emphasizes that the jury was obviously troubled by the matters which it was charged to consider. He contends that the jurors felt constrained to turn to the extra-record matter in order to resolve what they considered to be one of the key factors in determining the defendant's guilt or innocence: specifically, whether or not Solomon Weiss had criminal knowledge of the fraudulent scheme for which he was indicted. For example, in his testimony at the Voir Dire Hearing, Juror Number 3 testified:

> One of the key aspects of deciding whether or not Mr. Weiss was guilty rested on the argument of whether or not one can reasonably expect him to know certain kinds of things. The understanding that Mr. Kasanof would have had us to accept was that . . . [Mr. Weiss] was just following the kinds of things that a bookkeeper or accountant does without really having a good grasp of the significance of it . . . . And if the man was functioning as a bookkeeper then one might accept that, I suppose. But . . . to me what is important, to me the man is trained as a CPA.

(Hr. II 32-33); *see also* June 2, 1982 letter of the same juror quoted on pages 1228-1229, *supra*.

The defendant further argues that the extraneous matter would have been inadmissible if offered as evidence at trial. He claims first, that the textbook excerpts were irrelevant because they "at best relate to a standard of professionalism not applicable to Solomon Weiss", since Weiss was not acting as a CPA at Warner at any material time. Second, defendant argues that the excerpts could not have been admitted to set a standard of care for Weiss because they did not purport to prescribe specific duties and modes of professional conduct, as did the statutes and rules in the cases relied on by the govern-

ment. Third, the defendant argues that under the Second Circuit's recent decision in *United States v. Maniego*, 710 F.2d 24 (2d Cir. 1983), a practitioner, such as Solomon Weiss, cannot be held to a higher standard of conduct or legal obligation than others because of his professional status. Therefore, the textbook excerpt could not properly have been used to create such a standard of care.

In response, the government makes five main arguments denying that Weiss suffered any serious prejudice as a result of the infiltration of extra-record matter. First, it argues that the textbook excerpt furnished no more than a formal definition of a CPA and that it was cumulative of evidence properly before the jury. Second, the government contends that the nature of a CPA's duties are within the common knowledge of the jurors. Third, the government claims that the formal definition of a CPA was an inconsequential portion of the proof showing Weiss' guilty knowledge. Fourth, the government maintains that the excerpt from the text would clearly have been admissible as evidence if offered at trial. Finally, the government argues that in any event, the Court's instruction to the jury following its receipt of Exhibit "Y", cured any prejudice to defendant resulting from the extra-record matter.

Clearly, the decision that faces this court is a difficult one. Weiss was convicted after a lengthy and complicated investigation and trial. While the jury sincerely tried to perform its duty to the best of its ability in weighing the charges against Weiss, an undisputed error was committed by Juror #3 in introducing extra-record evidence during the jurors' deliberations. Furthermore, although the textbook definition of a CPA would by itself seem to be a neutral fact, and not inherently inculpatory,[31] the record in this case indicates that at least some of the

---

31 We note that many of the leading cases in this Circuit concerning jury contamination involve extra-record matter which was inherently suggestive of the defendant's guilt. See *United States v. Hillard*, *supra*, at 1063 (extra-record information *inter alia*, that defendants' "Black Sunday heroin operation . . . *was still* in operation." (emphasis added)); *Sher v. Stoughton*, *supra*, at 793 (several jurors received anonymous phone calls stating that the defendant was guilty); and *United States ex rel. Owen v. McMann*, *supra* at 815 (extra-record information *inter alia* that the defendant had been in trouble all his life.)

jurors deemed the definition to be relevant to the issue of Weiss' criminal knowledge. Therefore, we must examine the entire trial record to determine whether there was sufficient independent evidence of Weiss' criminal knowledge to render the infiltration of the extraneous information harmless.

At the outset, we must reject several of the government's arguments. First, the government argues that the extra-record evidence was purely cumulative because there is included in GX 182C, the stock prospectus for the WPT, information concerning an independent audit conducted by the CPAs Touche Ross & Co. On page 18 of the exhibit is the following:

> *"Experts"*
>
> The financial statements included in this Prospectus and in the Registration Statement have been examined by Touche Ross & Co., independent public accountants, as indicated in their report appearing elsewhere herein (qualified as set forth therein), and are included in reliance upon the report of such firm and upon their authority as experts in accounting and auditing.

The short answer to this argument is that GX 182C was not introduced for the purpose of explaining to the jury the special expertise or knowledge of a CPA; nor was the existence of this page [buried within the massive government exhibits] known to either the Court, defense counsel or the government attorney at the time of trial. When the note from the jurors regarding the definition of a C.P.A., see Exhibit "Y", was discussed by the Court at trial, both counsel agreed that *there was no evidence in the record as to what a CPA was and with the consent of both counsel, the Court so instructed the jury.* (Tr. 1996) Thus, in view of the trial record, the Court finds no evidence that the jury was aware that GX 182C explained the duties of a CPA.

The Court is also not persuaded by the government's argument that the Court issued an instruction which cured the problem now raised in reference to Court Exhibit "Y".[32] The

32 In response to the note, the Court stated to the jurors:

> As far as the inquiry that is above the line, the jurors must decide the case based upon the evidence or lack of evidence in this case.

Court disposed of this argument previously, at the May 20, 1983, pre-hearing conference.[33] Although the jurors were instructed in a general way that their decision must be based on evidence in the record, they were not specifically instructed to disregard the textbook excerpt, or any arguments of Juror #3 based on that excerpt. Nor could they have been, since evidence of the jury contamination, and the jury's use of the textbook excerpt in particular, did not surface until over six months after the trial was concluded.

The contention of the government that the nature and functions of a CPA were within the common knowledge of the jurors ignores the plain language of the jury's note to the Court. In that note the jurors were explicit: "Most of us are unfamiliar with the nature or the training of a CPA." See Court Exh. "Y" quoted on page 1227 *supra*. In addition, nothing to the contrary was revealed at the Court's post trial voir dire. Even if, as the government argues, one or more of the jurors knew what a CPA was from "their general knowledge," (Hr. II 38), their sharing of this information with the other jurors would not have been the equivalent of the introduction of an *authoritative* textbook definition. Accordingly, the Court cannot agree that the extraneous material added nothing to the juror's common knowledge.

The government further argues that no useful purpose would be served by a new trial since the definition of a CPA would then clearly be admissible. The Court agrees that evidence as to the training and duties of a CPA may be admissible as

---

> You cannot indulge in guess work, speculation or surmise. There is no statement in the record as to what a CPA is, and that is what the evidence is, a lack of evidence of an explanation of what a CPA is. As far as what is under the line on the paper [*i.e.*, "Re underlined (Xerox), sentences, Meigs and Meigs"], I don't understand what it means. So I will return the note to the jury, and if you will write a further note, if you desire, in explanation of what it means, "underline Xerox sentences," *et cetera*. We cannot figure out what that means.

(Tr. 1998-1999.)

33 Transcript of proceedings, May 20, 1983, at 10-11.

background information if properly introduced at trial.[34] However, we do not agree that the admissibility of the evidence is determinative on the issue of prejudice. The Court's decision not to instruct the jury on the definition of a CPA was not based on the admissibility or inadmissibility of the definition, but on the fact that the evidence was not properly introduced at trial, and thus not subject to rebuttal by the defense.[35] The Court concluded that instructing the jury as to information outside of the trial record would raise serious confrontation problems. The same problems are obviously raised by the jury's own acquisition of the extra-record material. Thus the question of prejudice clearly goes beyond the question of admissibility.

Despite our rejection of several of the government's arguments, we ultimately must agree with the government that the independent evidence of Weiss' criminal knowledge was so "abundant" as to render the infiltration of the textbook definition harmless. An exhaustive review of the record makes it apparent that in addition to the direct testimony of Emmett and Horwitz there was substantial circumstantial proof of Weiss' guilt; proof that was not contaminated by the extra-record matter defining the functions of a CPA. This circumstantial evidence included: evidence that Weiss forged the signature of Jay Emmett on an invoice to Warner; evidence that Weiss gave inconsistent testimony before the grand jury and at trial about matters relevant to his guilt; evidence that weiss was involved in the stock purchases through the writing of memos

---

34 The Court need not decide whether the definition of a CPA could have been introduced for the purpose of creating a professional standard of care applicable to Solomon Weiss. However, we note that had the government properly introduced the evidence at trial, the Court could have ruled on the purposes for which it could be considered, and instructed the jury accordingly. In this trial, the Court was unable to place any limitations on the jury's use of the definition.

35 For example if the definition of a CPA had been introduced during the cross-examination of Solomon Weiss, the defense, on rebuttal, could have emphasized the facts that Weiss was not a CPA for Warner, and was not involved in the auditing of Warner's books.

(including the memo to Mr. Hardy informing him that Warner needed $150,000 shortly for a cable option with the WPT) and the signing of most of the documents in question; evidence that not once prior to and not once since the occasion in question did Weiss' name ever appear on any documents for Warner's stock purchases; evidence that Weiss changed his course of conduct in preparing invoices for consulting services after being questioned by Albert Sarnoff; and evidence from Weiss' secretary that Weiss and Horwitz met and talked on the telephone several times during the period of the stock purchases.

In addition to the circumstantial evidence against Weiss, evidence of his professional background independent of his status as a CPA, was properly before the jury. The fact that Weiss was a CPA was only one aspect of his accounting and financial background developed at trial. He was not a mere bookkeeper who simply recorded numbers. The evidence presented indicated that Weiss was a sophisticated business man who had earned a masters of business administration degree from Rutgers University, had over ten years' experience working in a public accounting firm prior to being hired at Warner, where he was an Assistant Treasurer, and at one point had been a Vice President, and who had significant responsibilities in financial planning for Warner's chief executives.

In light of the other evidence in the record as to Weiss' professional background and corporate responsibilities, and the strong circumstantial evidence supporting the testimony of Emmett and Horwitz, we find that the possibility of prejudice arising from the infiltration of the extra-record matter is slight. There is ample evidence, exclusive of the extra-record information, to sustain the verdict. Therefore, although we reiterate that we believe this to be a very close question, we conclude that defendant's Rule 33 motion must be denied.

IV. DEFENDANT'S EARLIER RULE 29 AND RULE 33 MOTIONS

As stated earlier in this opinion, the defendant has also moved for judgment of acquittal, pursuant to Rule 29, or alternatively, for a new trial, pursuant to Rule 33. He makes several arguments in support of these motions. First, Weiss argues that because of the inherent incredibility of the government's principal witnesses, the credible evidence is insufficient to support a verdict of guilty on any account. Next, Weiss contends that the government failed to establish that he devised a scheme to defraud in violation of the RICO or mail fraud statues. Related to this, is Weiss' claim that the government's proof at trial on the RICO and mail fraud charges varied so greatly from the allegations in the indictment that the indictment was constructively amended in violation of Weiss' Fifth Amendment right to indictment by a grand jury. Finally, Weiss argues that his Fifth Amendment right to indictment by a grand jury was violated by the prosecutor's conduct in presenting the case to the grand jury in presenting the case to the grand jury and that the indictment should be dismissed. For the reasons stated below, the Court finds that Weiss' Rule 29 and 33 motions must be denied.

I. *The Credibility of Emmett and Horwitz*

As our earlier examination of the record makes clear, the government's case rested in significant part on the testimony of Emmett and Horwitz. Weiss argues that this testimony is not sufficiently credible to sustain the verdict.

The defendant relies upon testimony of Horwitz to the effect that he "unvaringly received the Warner checks from Weiss, who insisted upon receiving cash before giving Horwitz a check."[36] The uncontroverted testimony of the defendant, supported by his exhibits[37] was that the defendant was not in

---

36 Defendant's Memorandum in Support of Motion, hereafter (DM) p. 3.

37 Airline tickets, car rental bill, diary and expense vouchers.

New York on the date one of the alleged transfers took place, but, in fact, was in California.[38]

Based on this discrepancy, the defendant argues that no rational juror could have believed the testimony of Horwitz concerning the September 8th transaction. Therefore the jury was compelled to find that the testimony of Horwitz was so inherently illogical and incredible as to raise a reasonable doubt as to the defendant's guilt. The government responds that if the jury found Horwitz was mistaken as to the September 8th transaction, it could reasonably have decided the witness had a faulty recollection only as to that event and could reasonably have given credence to the balance of Horwitz' testimony.

Defendant further argues that Emmett's testimony was inherently incredible because of the strong motive which Emmett had to give false testimony against the defendant. Defendant points out that in exchange for Emmett's testimony as a cooperating witness, the government dismissed a RICO charge against him which would have jeopardized, upon conviction, Emmett's seven million dollar stock holdings in Warner.[39] At the trial, Emmett was cross-examined in great detail as to his stock holdings and his possible motivations in giving testimony. The cross-examination placed his credibility squarely in issue.

---

38 Weiss testified he was in California from September 6 through 9, 1976. The evidence showed that the $10,000 cash Horwitz claimed he gave Weiss, in New York, on September 8, 1976, included $9,500 withdrawn from a bank account on September 8th and $500 cash. Horwitz claimed he received a Warner check from Weiss for $15,344.20 in return for the $10,000 cash. The bank account shows, in addition to the withdrawals of $9,500 on September 8th, the deposit of the $15,344.20 Warner check on the same day—September 8th.

39 The defendant argues that the inclusion of the RICO count in the Emmett indictment was solely or primarily to create a bargaining tool in later plea negotiations and thereby violated the Department of Justice Guidelines. Whatever factual validity that claim may have, the Second Circuit Court of Appeals has held that non-compliance with internal departmental guidelines is not grounds for reversal. *United States v. Myers*, 692 F.2d 823 (2d Cir. 1982) *cert. denied*, ____ U.S. ____, 103 S.Ct. 2437, 77 L.Ed.2d 1322 (1983).

The Court cannot agree that defendant's challenges to the credibility of Emmett and Horwitz provide a sufficient basis to set aside the verdict.

In *United States v. Singh*, 628 F.2d 758, 766 (2d Cir.) *cert. denied*, 449 U.S. 1034, 101 S.Ct. 609, 66 L.Ed.2d 496 (1980), the Court of Appeals held that all issues of credibility are within the exclusive province of the jury. Since the jury in this case resolved the contested credibility issues as to the testimony of Horwitz and Emmett in favor of the government, this Court may not and should not disturb its verdicts. Nor does this Court find, on the record of the trial, that the jury was compelled to reach a different verdict. As stated in our discussion of the jury contamination issue, there was substantial circumstantial evidence on the record supporting Horwitz' and Emmett's testimony.

II. *The Fraud and Racketeering Counts*

Defendant contends that taking the evidence in the light most favorable to the government, the evidence offered in support of the mail fraud counts (which were also the predicate acts charged under the RICO count) does not, under any theory, establish that Weiss defrauded Warner. More specifically, defendant argues that the creation of a cash fund (which was the theory presented by the government to the jury) does not constitute a fraud. In order to establish mail fraud by an employee against his employer, the government must prove: (1) that the employee breached a duty owed to his employer and (2) that the violation of fiduciary duty was accompanied by failure to disclose material information to the employer while under a duty to do so. *United States v. Barta*, 635 F.2d 999, 1001 (2d Cir. 1980), *cert. denied*, 450 U.S. 998, 101 S.Ct. 1703, 68 L.Ed.2d 199 (1981). According to the defendant, the evidence in this case established neither a breach of Weiss' fiduciary duty to Warner nor a violation of a duty to disclose material facts. In addition there was no evidence that Weiss acted for personal gain or to harm Warner. In fact, the evidence showed no more than participation by Weiss in the

creation of deceptive documents, and the establishment of a Warner cash fund at the instructions of superiors. Therefore, the evidence does not support the jury's verdict that Weiss, in creating a cash fund, committed a fraud.

The government responds that the evidence clearly demonstrated that Weiss was a pivotal participant in a fraud perpetrated against Warner shareholders. This fraud, which was perpetrated between 1973, and 1977, consisted of the creation of a cash fund through bribery and the theft of Warner's assets. At no time did Weiss ever disclose the existence of this cash fund or this theft of Warner's assets to Warner's stockholders or to anyone. Such a disclosure by Weiss was mandatory in light of the fact that as an executive officer of Warner, Weiss owed a fiduciary duty to its stockholders to provide honest services and to perform his job in their best interests. *Id.*, at 1006.[40]

In deciding whether the verdict of the jury should be sustained, this Court must determine whether there is substantial evidence, taking the view most favorable to the government, to support the verdict. *Glasser v. United States*, 315 U.S. 60, 80, 62 S.Ct. 457, 469, 86 L.Ed. 680 (1942). Under this standard of review, and on the basis of the entire record, we find that there is substantial evidence that Weiss, an executive officer of Warner, defrauded Warner's shareholders by extracting and accepting $170,000 in cash bribes in return for arranging for Warner to purchase $250,000 worth of stock in the WPT and

---

40 In reply the defendant contends that the government raised its fiduciary duty to disclose argument for the first time in its Memorandum of Law. He claims that since this theory was not presented to the jury, it cannot be used to support the verdict. The Court cannot agree. During the charge conference, defense counsel suggested, and the government agreed, that since Weiss was a corporate officer, he as a matter of law owed a fiduciary duty to the corporation and its shareholders. Both sides requested that the court should not charge fiduciary duty as a fact to be found by the jury. Counsel further agreed that if the defendant were found guilty of the RICO counts, the mail fraud or tax counts, such finding, as a matter of law, would constitute a breach of fiduciary duty. The Court further notes that the proof was uncontroverted that the subject matter of Counts 2-4 was sent through the mails.

for converting $221,950 in Warner assets through bogus checks.

The defendant's argument is based on too narrow a view of the government's case. The indictment did not charge, nor was the evidence confined solely to the question of creation of a cash fund. Both the indictment and the evidence encompassed a scheme for the creation of a cash fund by the acceptance of kickbacks, conversion of corporate assets and the creation of false documentation to conceal the wrongful acts. Given the Second Circuit's opinion in *United States v. Barta*, *supra*, at 1007, there can be no serious dispute that the creation of false and fraudulent corporate documents by a corporate officer to conceal payments from the corporate treasury of monies expended for non-existent services, is a fraud on the corporation. Weiss contends that in the case at bar, unlike the situation in *Barta*, no clear conflict between the employee's duty to his employer and his own activities existed since Weiss acted, according to the government's evidence, on the instructions of Warner's highest officers. While it may or may not be true that Weiss' actions had his superiors' approval, the contention that the fraudulent activity was directed by higher officers of the corporation does not make the harm any less injurious to the corporate body. *See Goldberg v. Meridor*, 567 F.2d 209, 217 (2d Cir. 1977).[41]

Defendant's argument that Weiss' participation in the generation of a cash fund on behalf of Warner was not designed to inflict actual economic harm on Warner's shareholders must also be rejected. This argument simply ignores the fact that Weiss, in generating the cash fund casued economic injury in buying $250,000 of speculative WPT stock and in paying out $221,950 of corporate assets for non-existent

41 In *Meridor*, the Second Circuit affirmed in a civil context, the proposition that there is deception of the corporation (in effect, of its minority shareholders) when the corporation is influenced by its controlling shareholders to engage in a transaction adverse to the corporation's interests (in effect, the minority shareholders' interests) and there is nondisclosure or misleading disclosures as to the material facts of the transaction.

services,[42] in return for only $170,000 in cash. In addition, the fact that the proceeds from this scheme did not go into Weiss' pockets but instead formed a secret cash fund, does not make the scheme any less fraudulent. *See United States v. Margiotta*, 688 F.2d 108, 118 (2d Cir. 1982) *cert. denied*, ____ U.S. ____, 103 S.Ct. 1891, 77 L.Ed.2d 282 (1983) (the fraud there generated a "slush fund"). There is no requirement under the mail fraud statute that the perpetrator must enrich himself. As this Circuit explained in *Margiotta*:

> In the private sector, it is now a commonplace that a breach of fiduciary duty in violation of the mail fraud statute may be based on artifices which do not deprive any person of money or other forms of tangible property. *See United States v. Barta, supra*, 635 F.2d at 1005-06 (deprivation of employer's right to employee's honest and faithful services) . . . . Fraudulent schemes designed to cause losses of an intangible nature clearly come within the terms of the statute.

Id. at 121.

A close reading of the statute supports this result. Section 1341 prohibits "any scheme or artifice to defraud, *or* for obtaining money or property by means of false or fraudulent pretences, representations or promises." (emphasis added). Accordingly, the prohibition against schemes or artifices to defraud is properly interpreted as independent of the clause "for obtaining money or property" (cite omitted).

III. *The Constructive Amendment of the Indictment*

Finally, defendant argues that the indictment in this case with respect to counts one through five, was constructively amended. Specifically, Weiss argues that the indictment demonstrates that the grand jury believed the case involved bribery of Weiss and theft by him and others of corporate monies. This theory, Weiss argues, was displaced with a "cash fund" theory at trial.

---

42 Even assuming the $170,000 "kickback" was placed in a cash fund for the benefit of the corporation, it is significantly less than the $221,950 which was paid out.

The Court does not find a "shift of theory" or a constructive amendment of the indictment by the proof submitted to the jury. The indictment in this case charged, *inter alia*, that Weiss and others having devised and intending to devise a scheme and artifice to defraud Warner and its shareholders and for obtaining money from Warner and its shareholders by means of false and fraudulent pretenses, representations and promises, unlawfully, wilfully and knowingly, and for the purpose of executing said scheme and artifice and attempting so to do, did cause to be placed in post offices and authorized depositories for mail matter, and did cause to be delivered by mail according to the direction thereon, certain matter to be sent and delivered by the Postal Service, in violation of Title 18, United States Code, Section 1341, as set forth below:

The jury was given copies of the indictment and they were charged in part:

> You must first determine whether the credible evidence established the existence of the fraudulent scheme charged in the indictment
>
> . . . .
>
> The government contends that the fraudulent scheme was the creation of the cash fund at Warner. . . .
>
> The government must establish beyond a reasonable doubt that the defendant wilfully and knowingly participated in the fraudulent scheme with knowledge of its unlawful purposes and in furtherance of its unlawful objectives.

At trial, the government presented the theory that through bribery (the initial cash payment by Horwitz to Weiss) and theft by Weiss and others of corporate monies, a secret cash fund was established. The jury charge specifically mentions the creation of a cash fund. However, neither at trial nor during the jury charge conference did Weiss ever object to the evidence or instructions concerning the cash fund. Furthermore, there is no variance between the proof and the pleadings in this case. *See Dunn v. United States*, 442 U.S. 100, 105, 99 S.Ct.

2190, 2193, 60 L.Ed.2d 743 (1979). The cash fund proof offered at trial was not an alternative theory, but simply traced the proceeds of the illegal scheme.

In sum, the Court finds that the government contended, and the jury found, that Weiss received the $70,000 in the May transaction and the $100,000 in the July transaction in his capacity as a corporate officer who was under a duty not to provide false documentation to conceal the nature of the transactions in the corporate records. This Court is of the opinion that the receipt by Weiss of these monies, whether denominated corporate bribes or kickbacks; and their deliberate concealment, operated as a fraudulent scheme upon the corporation and its shareholders. Accordingly, defendant's motion with respect to the fraud and RICO counts must be denied.

IV. *The Grand Jury presentation*

Weiss also moves to dismiss the indictment on the grounds that the prosecution improperly told the grand jury information about the case that the grand jury did not possess and improperly elicited Emmett's and Horwitz' testimony before the grand jury through leading questions.

The government defends its actions by stating that the prosecutor did not inform the grand jury of information that was unavailable to them. The government also denies that there was anything improper about the fact that the government elicited Emmett's and Horwitz' testimony through leading questions.

This Court has previously expressed its views about a grand jury presentation in which all of the evidence heard by the grand jurors was through leading questions posed by the Assistant United States Attorney. Such excessive control of witnesses deprives the grand jurors of their ability to assess the credibility of the witness and the reliability of the story told. However, this appears to be the practice in this District and although the Second Circuit has commented on the government's presentations in other contexts, it has not in its supervi-

sory capacity, condemned this practice. (*See, e.g., United States v. Jacobson*, 691 F.2d 110, 115-16 (2d Cir. 1982); *United States v. Ciambrone*, 601 F.2d 616, 623 (2d Cir. 1979); *United States v. Estepa*, 471 F.2d 1132, 1137 (2d Cir. 1972); *United States v. Provenzano*, 440 F. Supp. 561, 565-66 (S.D.N.Y. 1977); *United States v. Pastor*, 419 F. Supp. 1318, 1323-24 (S.D.N.Y. 1975); *United States v. Gallo*, 394 F. Supp. 310, 315-16 (D. Conn. 1975). This Court is of the opinion that this argument should be addressed to the Second Circuit.

The Court need not here repeat the reasons for its ruling, during trial, that the issue of materiality would not be presented to the jury as part of the perjury charge. The trial record is clear.

Finally, defendant states that the question of forfeiture under the RICO statute, should be addressed when and if it becomes ripe in connection with sentencing. In accord with this thinking, the Court will address the issue of the RICO forfeiture prior to sentencing.

For the above stated reasons, this Court also denied defendant's Rule 29 and 33 motions.

It Is So Ordered.

Indictment

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Cr. 636 (MJL)

UNITED STATES OF AMERICA,

—v—

SOLOMON WEISS,

Defendant.

COUNT ONE

RACKETEERING

The Grand Jury charges:

Introduction

1. At all times relevant to this Indictment the defendant, SOLOMON WEISS, was employed by and associated with Warner Communications, Inc. (hereinafter "Warner") a corporation in the entertainment industry, as Assistant to the Treasurer.

2. From on or about January 1, 1973, up to and including the date of this filing of this Indictment, in the Southern District of New York and elsewhere, the defendant, SOLOMON WEISS, and others known and unknown to the Grand Jury, all of whom were employed by and associated with Warner, an enterprise engaged in and the activities of which affect interstate commerce, did unlawfully, wilfully and knowingly conduct and participate, directly and indirectly, in the conduct of Warner's affairs through a pattern of racketeering

activity, which included acts of racketeering set forth in paragraph 3 through 10 of Count 1 of this Indictment, to wit, acts indictable under Title 18, United States Code, Section 1341 (relating to mail fraud), in violation of Title 18, United States Code, Section 1962(c).

THE PATTERN OF RACKETEERING

Racketeering Acts One Through Thirteen—Mail Fraud

3. It was a part of the pattern of racketeering activity that from on or about January 1, 1973, up to and including the date of the filing of this Indictment, in the Southern District of New York and elsewhere, that the defendant, SOLOMON WEISS, and others known and unknown to the Grand Jury, having devised and intending to devise a scheme and artifice to defraud Warner and its shareholders and for obtaining money from Warner and its shareholders by means of false and fraudulent pretenses, representations and promises, unlawfully, wilfully and knowingly, and for the purpose of executing said scheme and artifice and attempting so to do, did cause to be placed in post offices and authorized depositories for mail matter, and did cause to be delivered by mail according to the direction thereon, certain matter to be sent and delivered by the Postal Service, in violation of Title 18, United States Code, Section 1341, as set forth below:

ACT	*APPROXIMATE DATE*	*ADDRESSEE*	*MATTER*
1	May 31, 1973	Warner Communications, Inc. Att Bert Weinberg 10 Rockefeller Plaza New York, New York 10020	Confirmation for 20,000 shares of Theatre Stock
2	July 3, 1973	Warner Communications, Inc. Att Bert Weinberg 10 Rockefeller Plaza New York, New York 10020	Confirmation for 20,000 shares of Theatre Stock

ACT	APPROXIMATE DATE	ADDRESSEE	MATTER
3	July 5, 1973	Mr. Leonard Horwitz 266 Old Range Road Wilton, Connecticut	Letter requesting The fraudulent bill for the $30,000 check to Konner
4	July 11, 1973	Mr. Manjid Shokla Otto Weinmann 15 William Street New York, New York 10005	Letter and Warner check in the amount of $100,750
5	October 23, 1973	Mr. Leonard Horwitz 266 Old Range Road Wilton, Connecticut	Letter requesting the fraudulent bill for the $30,000 check to Konner
6	February 1, 1974	Dennis Konner 4360 Douglaston Parkway Douglaston, N.Y. 11363	Form 1099 for the $30,000 check to Konner
7	February 1, 1975	Bruce Kosman 5101 Collins Avenue Miami, Florida 33140	Form 1099 for the $30,000 check to Kosman
8	February 1, 1975	Leonard Horwitz 266 Old Range Road Wilton, Connecticut	Form 1099 for the $20,000 in checks to Horwitz
9	February 1, 1976	Leonard Horwitz 266 Old Range Road Wilton, Connecticut	Form 1099 for the $25,000 check to Horwitz
10	August 11, 1976	Mr. Bruce Kosman One Strawberry Hill Court Stamford, Connecticut 06902	Letter relating to the fraudulent Jungle Habitat study
11	August 18, 1976	Mr. Bruce Kosman One Strawberry Hill Court Stamford, Connecticut 06902	Letter relating to the fraudulent Jungle Habitat study
12	August 18, 1976	Mr. Bruce Kosman One Strawberry Hill Court Stamford, Connecticut 06902	Letter relating to the fraudulent Jungle Habitat study

ACT	APPROXIMATE DATE	ADDRESSEE	MATTER
13	February 1, 1978	Leonard Horwitz 285 Valley Road Redding Ridge, Connecticut 06876	Form 1099 for the $20,000 check to Horwitz

Object of the Scheme

4. It was an object of the scheme and artifice to defraud that the defendant, SOLOMON WEISS, and others known and unknown to the Grand Jury would and did secretly and corruptly extract and accept cash bribes in return for which they caused Warner to purchase common stock in the Westchester Premier Theatre, a live entertainment theatre proposed to be constructed in Greenburgh, New York (hereinafter the "Theatre"), thereby violating their fiduciary duties to Warner and its shareholders to provide honest and faithful services, undivided loyalty and to perform their executive obligations in good faith and exclusively in the best financial interest of Warner and its shareholders.

5. It was a further object of the scheme and artifice to defraud that the defendant, SOLOMON WEISS, and others known and unknown to the Grand Jury would and did secretly and corruptly siphon and convert approximately $221,950 in checks which belonged to Warner and its shareholders, thereby violating their fiduciary duties to Warner and its shareholders to provide honest and faithful services, undivided loyalty and to perform their executive obligations in good faith and exclusively in the best financial interests of Warner and its shareholders.

6. It was a further object of said scheme and artifice to defraud that in order to siphon and to convert the checks from Warner and to conceal the fraudulent conversion of those checks, the defendant, SOLOMON WEISS, and others known and unknown to the Grand Jury would and did cause fraudulent documents to be prepared. Said fraudulent documents

represented and made it appear that the checks being siphoned and converted were being paid to third parties for services rendered to Warner, when in truth and fact as the defendant, SOLOMON WEISS, then and there well knew, said documentation was false, fraudulent and misleading in that, among other things, said services were non-existent.

Methods and Means

7. The methods and means employed by the defendant, SOLOMON WEISS, and others known and unknown to the Grand Jury, included, among others, the following:

a. On or about May 29, 1973, the defendant, SOLOMON WEISS, secretly and fraudulently accepted a $50,000 cash bribe and extracted a promise of an additional $50,000 in cash to be paid at a subsequent time, and in return for which the defendant, SOLOMON WEISS, promised to arrange for Warner to purchase 20,000 shares of the Theatre's stock.

b. On or about May 30, 1973, the defendant, SOLOMON WEISS, in furtherance of the fraudulent scheme described in paragraph 7(a) of Count 1 of this Indictment fraudulently prepared and initialed a Request for Check form for the purchase by Warner of 20,000 shares of Theatre stock for the price of $150,000.

c. On or about July 3, 1973, in furtherance of the fraudulent scheme described in paragraph 7(a) of Count 1 of this Indictment, the defendant, SOLOMON WEISS, fraudulently siphoned and converted $50,000 in checks from Warner by causing Warner to issue two checks for non-existent services totalling $50,000, to wit, a check to the Theatre for $30,000 and a check to unindicted co-venturer, Leonard Horwitz, for $20,000, and in return defendant, SOLOMON WEISS, accepted $20,000 in cash towards the additional $50,000 cash described in paragraph 7(a) of Count 1 of this Indictment.

d. On or about July 26, 1973, the defendant, SOLOMON WEISS, fraudulently prepared and initialed a Request for Check form for a $30,000 check for non-existent services

drawn on Warner and dated, July 26, 1973, and made payable to Dennis Konner, as a substitution for the $30,000 Warner check to the Theatre, dated July 3, 1973.

e. On or about July 3, 1973, the defendant, SOLOMON WEISS, secretly and fraudulently extracted a promise of a $100,000 cash bribe to be paid after the Theatre opened to the public, and in return for which the defendant, SOLOMON WEISS, promised to arrange for Warner to purchase 20,000 additional shares of the Theatre's stock at the cost of $100,750.

f. On or about July 11, 1973, the defendant, SOLOMON WEISS, fraudulently initialed stock confirmations in the name of the stockbrokerage firm Otto Weinmann, thereby causing Warner's payment of $100,750 for an additional 20,000 shares of the Theatre's stock.

g. In or about December, 1973, when it became apparent that the Theatre would open to the public at a date later than anticipated in July, 1973, the defendant, SOLOMON WEISS, arranged to receive the $100,000 in cash described in paragraph 7(e) of Count 1 of this Indictment through the fraudulent conversion of checks drawn on Warner.

h. Between on or about January 14, 1974, and on or about June 9, 1977, the defendant, SOLOMON WEISS, fraudulently caused Warner to issue approximately $171,950 in ten separate checks to either unindicted co-venturers, Leonard Horwitz or Bruce Kosman, for non-existent services, and received in return approximately $100,000 in cash in furtherance of the arrangement described in paragraph 7(g) of Count 1 of this Indictment.

(Title 18, United States Code, Section 1962(c).)

COUNTS TWO THROUGH FIVE

MAIL FRAUD

The Grand Jury further charges:

1. Each and every allegation contained in paragraphs 1 and 4 through 7 of Count 1 of this Indictment is hereby repeated,

realleged and incorporated by reference herein as fully set forth.

2. From on or about January 1, 1973, up to and including the date of this filing of this Indictment, in the Southern District of New York and elsewhere, the defendant, SOLOMON WEISS, and others known and unknown to the Grand Jury, having devised and intending to devise a scheme and artifice to defaud Warner and its shareholders and for obtaining money from Warner and its shareholders by means of false and fraudulent pretenses, representations and promises, unlawfully, wilfully and knowingly, and for the purpose of executing said scheme and artifice and attempting so to do, did cause to be placed in post offices and authorized depositories for mail matter, and did cause to be delivered by mail according to the direction thereon, certain matter to be sent and delivered by the Postal Service, in violation of Title 18, United States Code, Section 1341, as set forth below:

COUNT	*DATE*	*ADDRESS*	*MATTER*
2	August 11, 1976	Mr. Bruce Kosman One Strawberry Hill Court Stamford, Connecticut 06902	Letter relating to the fraudulent Jungle Habitat Study
3	August 18, 1976	Mr. Bruce Kosman One Strawberry Hill Court Stamford, Connecticut 06902	Letter relating to the fraudulent Jungle Habitat Study
4	August 18, 1976	Mr. Bruce Kosman One Strawberry Hill Court Stamford, Connecticut 06902	Letter relating to the fraudulent Jungle Habitat Study
5	February 1, 1978	Leonard Horwitz 285 Valley Road Redding Ridge, Connecticut 06876	Form 1099 for the $20,000 check to Horwitz

(Title 18, United States Code, Section 1341.)

PERJURY

COUNT SIX

The Grand Jury further charges:

1. Each and every allegation contained in paragraphs 1 and 4 through 7 of Count 1 of this Indictment is hereby repeated, realleged and incorporated by reference herein as though fully set forth.

2. Beginning on or about May 1, 1977, and continuously up to and including May 8, 1978, a Grand Jury of the Southern District of New York which had been duly empanelled and sworn on or about November 9, 1976, was conducting an investigation to determine whether violations of Title 18, United States Code, Sections 1341 (mail fraud), 1962 (racketeering), and of other statutes of the United States had been committed in the Southern District of New York in connection with the sale of stock in the Theatre and the operation of Warner and to identify the individuals who had committed, caused the commission of, and conspired to commit such violations.

3. On or about the 10th day of April, 1978, in the Southern District of New York, the defendant, SOLOMON WEISS, having duly taken an oath that he would testify truly before said Grand Jury, unlawfully, wilfully and knowingly and contrary to his oath did make false material declarations, which he knew to be false.

4. It was material to the Grand Jury investigation to determine who approached Warner to purchase the 20,000 shares of Theatre stock during the public offering and who approached Warner to purchase the 20,000 shares of Theatre stock after the public offering.

5. At the time and place aforesaid, the defendant, SOLOMON WEISS, appearing as a witness before the Grand Jury, did testify falsely under oath before said Grand Jury with respect to the aforesaid material matter as follows:

[False Answers Underscored]

Q. Do you know who it was that approached Warner Communications asking them to buy stock in the Westchester Premier Theatre in July of 1973?

A. *No, I don't*

* * *

Q. Now, did Mr. Horwitz, to your knowledge, have anything to do with the sale of 40,000 shares of Westchester Premier Theatre stock to Warner Communications in 1973?

A. *I don't know.*

Q. In other words, to the best of your knowledge, Mr. Horwitz had absolutely nothing to do with the sale of 20,000 shares of Westchester Premier Theatre stock to Warner Communications in either May of 1973 or in July 1973, is that correct?

A. *I don't know if he had anything to do with it, yes.*

Q. Have you ever discussed with Mr. Horwitz the purchase of Westchester Premier Theatre stock by Warner Communications in May and July of 1973?

A. *Not to my knowledge.*

* * *

Q. Did Mr. Horwitz have anything to do with the sale of 20,000 shares of Westchester Premier Theatre stock to Warner Communications in July of 1973?

A. *I don't know*

6. The aforesaid testimony of the defendant, SOLOMON WEISS, as he then and there well knew, was untrue in that he knew that on or about May 29, 1973, unindicted co-venturer, Leonard Horwitz, approached him on behalf of the Theatre and gave him a $50,000 secret cash bribe and a promise of an additional $50,000 at a later date in return for which the defendant, WEISS, caused Warner to buy the 20,000 shares of Theatre stock and in that he also knew that on or about July 3, 1973, Horwitz had again approached him on behalf of the Theatre and had agreed to give Warner a $100,000 cash bribe

in return for which the defendant, WEISS, caused Warner to buy another 20,000 shares of Theatre stock.

(Title 18, United States Code, Section 1623.)

COUNT SEVEN

The Grand Jury further charges:

1. Each and every allegation contained in paragraphs 1 and 4 through 7 of Count 1 of this Indictment and paragraphs 2 and 3 of Count 6 of this Indictment is hereby repeated, realleged and incorporated by reference herein as though fully set forth.

2. It was material to the Grand Jury investigation to determine whether any services were performed for Warner by Dennis Konner for a $30,000 check drawn on Warner on July 26, 1973, and made payable to Dennis Konner.

3. At the time and place aforesaid, the defendant, SOLOMON WEISS, appearing as a witness before the Grand Jury, did testify falsely under oath before said Grand Jury with respect to the aforesaid material matter as follows:

[False Answers Underscored]

Q. To your knowledge, did Mr. Horwitz have anything to do with the $30,000 payment to Dennis Konner in July 1973?

A. *To the best of my knowledge, no.*

* * *

Q. Now, Mr. Konner was a law partner of Mr. Norman Brodsky. Do you know who he is?

A. I have been told they were partners.

Q. Mr. Brodsky also worked with Mr. Horwitz at Westchester Premier Theatre, did you know that?

A. No, I did not.

Q. Mr. Brodsky and Mr. Horwitz were also selling the stock in the Westchester Premier Theatre in May, June, and July of 1973. Is it just a coincidence that Mr. Konner

received thirty thousand dollars at approximately the same time that Warner Communications purchased forty thousand shares of stock?

A. *I guess it would have been.*

Q. So to your knowledge the fact that the stock was purchased in the Westchester Premier Theatre and the fact that $30,000 was paid to Dennis Konner is simply a coincidence, is that right?

A. *To the best of my knowledge.*

4. The aforesaid testimony of the defendant, SOLOMON WEISS, as he then and there well knew, was untrue in that the defendant, SOLOMON WEISS, knew that Dennis Konner had never performed any services for Warner whatsoever and that the defendant, SOLOMON WEISS, had caused the issuance of the $30,000 Warner check for non-existent services as part of the fraudulent scheme whereby he received the $50,000 secret cash bribe and a promise of an additional $50,000 in cash to be paid at a subsequent time in return for him causing Warner to purchase 20,000 shares of Theatre stock in the public offering.

(Title 18, United States Code, Section 1623.)

COUNT EIGHT

The Grand Jury further charges:

1. Each and every allegation contained in paragraphs 1 and 4 through 7 of Count 1 of this Indictment and paragraphs 2 and 3 of Count 6 of this Indictment is hereby repeated, realleged, and incorporated by reference herein as though fully set forth.

2. It was material to the Grand Jury investigation to determine whose signature appeared on the bill to Warner dated July 11, 1973 on the stationery of Dennis Konner.

3. At the time and place aforesaid, the defendant, SOLOMON WEISS, appearing as a witness before the Grand Jury did testify falsely under oath before said Grand Jury with respect to the aforesaid material matter as follows:

[False Answers Underscored]

Q. Directing your attention to the last page of Grand Jury Exhibit No. 4, whose handwriting is it that appears on the bottom of that letter dated July 11, 1973?

A. *I believe it to be that of Jay Emmett.*

* * *

Q. Directing your attention to Grand Jury Exhibit No. 4, you testify, did you not, that you did not know what that particular matter was about that Dennis Konner performed services for, is that correct?

A. I testified that in reading this voucher that it was in conjunction with the cable acquisition and other matters.

Q. Now, did you know who it was that this work was done for in Warner Communications?

A. No, I do not.

Q. Now, that is Jay Emmett's signature on the last page?

A. *I believe so.*

4. The aforesaid testimony of the defendant, SOLOMON WEISS, as he then and there well knew, was untrue in that he knew that he had forged Jay Emmett's signature on the bill to Warner, dated July 11, 1973, on the stationery of Dennis Konner.

(Title 18, United States Code, Section 1623.)

COUNT NINE

[Superseding Count]

The Grand Jury further charges:

1. At all times relevant to this Indictment the defendant, SOLOMON WEISS, was employed by and associated with Warner Communications, Inc. (hereinafter "Warner") a corporation in the entertainment industry, as Assistant to the Treasurer.

2. Beginning on or about May 1, 1977, and continuously up to and including May 8, 1978, a Grand Jury of the Southern

District of New York which had been duly empanelled and sworn on or about November 9, 1976, was conducting an investigation to determine whether violations of Title 18, United States Code, Sections 1341 (mail fraud), 1962 (racketeering), and of other statutes of the United States had been committed in the Southern District of New York in connection with the sale of stock in the Westchester Premier Theatre and the operation of Warner and to identify the individual who had committed, caused the commission of, and conspired to commit such violations.

3. On or about the 10th day of April, 1978, in the Southern District of New York, the defendant, SOLOMON WEISS, having duly taken an oath that he would testify truly before said Grand Jury, unlawfully, wilfully and knowingly and contrary to his oath did make false material declarations, which he knew to be false.

4. It was material to the Grand Jury investigation to determine whether Leonard Horwitz or Bruce Kosman ever performed any actual services or did any work for Warner.

5. At the time and place aforesaid, the defendant, SOLOMON WEISS, appearing as a witness before the Grand Jury did testify falsely under oath before said Grand Jury with respect to the aforesaid material matter as follows:

[False Answers Underscored]

Q. Now, you also testified that Mr. Bruce Kosman was another individual at Westchester Premier Theatre that you had a working relationship with, is that right?

A. Yes, sir.

Q. What was that all about?

A. *He assisted us in some other services that we were doing.*

Q. What kind of services were those?

A. *He was in conjunction with the sale of the and that we owned in Jungle Habitat in New Jersey.*

* * *

6. The aforesaid testimony of the defendant, SOLOMON WEISS, as he then and there well knew, was untrue in that the defendant, SOLOMON WEISS, knew that Bruce Kosman had in fact never performed any services for Warner nor assisted Warner in any services in conjunction with the sale of land in Jungle Habitat.

(Title 18, United States Code, Section 1623.)

COUNTS TEN THROUGH THIRTEEN

The Grand Jury further charges:

On or about the dates set forth below in Counts 10 through 13 in the Southern District of New York, the defendant, SOLOMON WEISS, unlawfully, wilfully and knowingly did aid and assist in, and procure, counsel, and advise the preparation and presentation to the Internal Revenue Service of United States Corporation Income Tax Returns, Forms 1120, for Warner Communications, Inc., for the taxable years set forth below in Counts 10 through 13, which were false and fraudulent as to material matters, in that the itemized deductions for legal and professional fees were fraudulently claimed in amounts in excess of that which were actually incurred as set forth below in Counts 10 through 13:

COUNT	*DATE*	*TAXABLE YEAR OF CORPORATION INCOME TAX RETURN*	*APPROXIMATE AMOUNT OF FRAUDULENTLY CLAIMED FEE*
10	September 15, 1975	1974	$50,000
11	September 13, 1976	1975	$25,000
12	September 12, 1977	1976	$38,369.30
13	September 8, 1978	1977	$58,581.40

(Title 26, United States Code, Section 7206(2).)

FORFEITURES

The Grand Jury further charges:

1. All of the allegations contained in Counts 1 through 9 of this Indictment are hereby incorporated by reference herein

and realleged as if fully set forth for the purpose of alleging forfeitures pursuant to the provisions of Title 18, United States Code, Section 1963.

2. The defendant, SOLOMON WEISS, has interests in, security of, claims against, and property and contractual rights affording a source of influence over Warner which he established, operated, controlled, conducted and participated, directly and indirectly, in the conduct of, in violation of Title 18, United States Code, Section 1962, thereby making said interests subject to forfeiture to the United States pursuant to Title 18, United States Code, Section 1963(a)(2).

3. The interests of the defendant, SOLOMON WEISS, subject to forfeiture to the United States include any interests in, security of, claim against and property and contractual right of any kind affording a source of influence over the enterprise, including Warner stock, and any and all positions with and ownership interests in Warner and the monies received and specified in Count 1 of this Indictment.

(Title 18, United States Code, Section 1963).

FOREPERSON

WILLIAM M. TENDY
Acting United States Attorney

Excerpt from the Government's Opening Statement, November 3, 1982

The government's evidence in this case will show that over a six-year period, certain high executives at Warner Communications, this nation's largest entertainment corporation, schemed to defraud the company of their duty to provide honest and faithful services to the company's stockholders by creating a cash fund of approximately $170,000.

This cash fund was created out of bribes, phony invoices, false, fraudulent and misleading documentation, and Warner checks for none existent services.

When a grand jury in this courthouse where we now sit began investigating these crimes, these same Warner executives endeavored to stonewall the grand jury's investigation through perjury, deception and outright lies.

One of the Warner executives who sought to obstruct that grand jury investigation and one of the Warner executives who was the banker for the cash fund at Warner, was this man, the defendant, Solomon Weiss.

That, in a nutshell is what this case is all about.

In this opening statement, I'm going to review for you what the government's evidence will prove as this trial proceeds. The purpose of this opening statement is fairly straighforward. In a criminal trial, evidence is presented to you piecemeal through individual witnesses and individual documents. The combined testimony of these witnesses, and the combination of these documents will be the government's case. By outlining for you at the beginning what the government's case will show, hopefully, it will make it easier for you, as this trial progresses, to understand how each piece of testimony and how each document fits into the entire overall case.

Now, let me say at the outset, that this case is a simple one. Basically, consisting of two parts. First, it is about a fraudulent scheme to create a financial fund. And second, it's about an attempt to obstruct the grand jury, which was investigating that scheme.

Now, in the course of this trial, you will learn how the chairman of the board of Warner designated the defendant, Weiss, as banker or overseer of a secret cash fund at Warner.

You will learn that in May, 1973, the defendant Weiss, on behalf of Warner, accepted $70,000 in cash bribes from a representative of the Westchester Premier Theatre, a live entertainment complex in Tarrytown, New York. And that in return for these $70,000 in cash bribes, the defendant Weiss and other Warner executives, arranged for Warner to purchase stock in the Westchester Premier Theatre.

You will also learn that about one month later, the defendant Weiss, on behalf of Warner, entered into a second secret arrangement with a representative of the Westchester Premier Theatre, whereby Warner bought additional stock in the Westchester Premier Theatre, in return for a promise of $100,000 in cash.

You will also learn that the Westchester Premier Theatre was unable to make good on its secret promise to deliver that $100,000 in cash.

At that time, when the theatre was unable to deliver that cash, the defendant Weiss agreed to a change in the original arrangement. Instead of accepting for Warner an outright payment of $100,000 in cash, Weiss arranged for Warner to issue checks to theatre representatives, who, in turn, gave cash to Weiss, for these checks.

Thus, over a four-year period, the defendant Weiss caused Warner to issue more than $150,000 in Warner checks to representatives of the Westchester Premier Theatre for services that were simply not, in fact, performed.

In return for these checks, the Westchester Premier Theatre representative delivered cash to the defendant Weiss totalling in the end, precisely $100,000.

Finally, you will learn that in late 1977, early 1978, a federal grand jury began investigating certain aspects of the Warner cash fund. At that time, the defendant Weiss and others gave false, evasive, misleading and perjurious testimony and concealed documents to obstruct the grand jury's investigation.

In essence, the evidence will show that the defendant Weiss assisted other Warner executives in defrauding the corporation's stockholders and then trying to cover it up.

This is a general picture of the criminal activity charged in this case, which the government will prove during the course of this trial.

I would now like to give you a little more specific outline of the government's proof as anticipated in this case.

Specifically, the proof in this case will show that at the end of May, Leonard Horwitz, a representative of the Westchester Premier Theatre, approached his friend Jay Emmett, then a vice president of Warner Communications, to buy stock in the Westchester Premier Theatre.

On behalf of the theatre, Horwitz offered Jay Emmett a $50,000 cash loan to be used towards the purchase of Westchester Premier Theatre stock. At that time Horwitz had with him $50,000 in cash in a brown paper bag.

Emmett, however, refused Horwitz' offer but told him that Warner, the company, might be interested in this proposition.

Emmett then met with Steven Ross, the chairman of the board of Warner, who instructed Emmett to bring Horwitz together with the defendant Weiss, the assistant treasurer of Warner Communications.

Horwitz, the Westchester Premier Theatre representative, met with the defendant Weiss, and they negotiated a deal, whereby Warner purchased 20,000 shares of Westchester Premier Theatre stock.

In return, the Westchester Premier Theatre, represented by Horwitz, promised to give Warner $100,000 in cash.

At that initial meeting, when the defendant Weiss extracted from Horwitz, the representative from the Westchester Premier Theatre, the promise of $100,000 in cash, Horwitz gave the defendant Weiss the brown paper bag containing the $50,000 in cash, which he had with him.

A short time later, the defendant Weiss asked Horwitz for the remaining $50,000 in cash. The theatre, however, at that time, did not have $50,000 in cash.

So to satisfy the theatre's obligation to Warner, defendant Weiss agreed to accept only $20,000 in additional cash, rather than the $50,000. The theatre was able to raise this $20,000 because, as part of this deal, the defendant Weiss caused

Warner to issue two Warner checks to Westchester Premier Theatre representatives for services that were never, in fact, performed.

In order to make one of these checks look legitimate, the defendant Weiss placed a phony backdated invoice in the files of Warner Communications.

In early July, 1973, almost a month after this first stock deal, after the time that Warner purchased its first lot of stock in the Westchester Premier Theatre, the defendant Weiss entered into a second deal with the Westchester Premier Theatre through Horwitz, the theatre's representative.

At that time, the defendant Weiss arranged to have Warner purchase another 20,000 shares of Westchester Premier Theatre stock. In return for Warner purchasing this second lot of 10,000 shares of Westchester Premier Theatre stock, Horwitz promised that the theatre would deliver $100,000 in cash to Warner, when the theatre was scheduled to open in early 1974.

In late 1973, it became apparent that the theatre was not going to open in 1974. Therefore, the theatre would not have the $100,000 in cash. So the defendant Weiss renegotiated the deal.

Instead of Warner receiving an outright payment of $100,000 in cash, the defendant Weiss arranged for payment of $100— over $150,000 in bogus Warner checks to Horwitz and another representative of the Westchester Premier Theatre.

In exchange for these checks, which were issued in 1974, 1975, 1976 and 1977, Horwitz delivered cash to defendant Weiss at Warner Communications, which in the end totalled precisely $100,000 in cash.

Now, to justify Warner's issuance of these Warner checks, the defendant Weiss created phony internal documentation at Warner, fraudulently stating that Horwitz and another individual performed for Warner in connection with Jungle Habitat, Warner's Animal Park, but the fact is that no such work was ever done.

In late 1977, early 1978, a federal grand jury sitting in this very courthouse, began investigating Warner Communications' role in its purchase of Westchester Premier Theatre stock.

One of the Warner executives who was subpoenaed before that grand jury was the defendant Solomon Weiss.

In the course of his testimony, he repeatedly lied. He gave false, evasive and misleading testimony designed to thwart and obstruct the grand jury's investigation.

Defendant Weiss also concealed documents subpoenaed by that grand jury.

In sum, the evidence will show that Warner purchased two lots, two purchases of Westchester Premier Theatre stock because of cash bribes.

The Warner executive who negotiated both stock purchases for Warner and the Warner executive who acted as the banker for this cash, was the defendant Solomon Weiss.

When the grand jury began investigating these crimes, defendant Weiss lied to the grand jury and concealed documents from the grand jury.

This case is as simple as that.

To prove the charges in this case, the government will present before you a large number of documents, some bearing the defendant Weiss' handwriting and initials.

For example, you will see the Warner documents authorizing Warner's two purchases of stock in the theatre with the handwriting of the defendant.

You will also see many of these Warner forms authorizing checks to Westchester Premier Theatre representatives. Some of these forms bear the defendant Weiss' initials and own handwriting.

In addition to these documents, you're also going to hear from a number of witnesses who will testify before you from this witness stand in this courtroom.

Among the witnesses that you're going to hear from are accomplice witnesses. They are people who actually participated in the crimes with this defendant. One of these accomplice witnesses will be Jay Emmett, who from 1973 to 1981, rose in Warner from a vice president to the office of the president.

Mr. Emmett will give you the insider's view of the fraudulent scheme. He will tell you of his meeting with the chairman of

the board of Warner, who instructed him to put Horwitz together with defendant Weiss.

Mr. Emmett will tell you of his role in this fraudulent scheme of initialling and approving phony invoices, thereby causing Warner to issue checks for services that were in fact never performed.

You'll also learn that Mr. Emmett is testifying here because in February, 1981, he entered into a cooperation agreement with the government. He agreed to testify truthfully and pled guilty to two felony counts exposing him to a 20-year prison sentence.

Mr. Emmett has not yet been sentened. He is hoping that his sentencing judge will take his cooperation into account at the time of his sentence; and that this cooperation will result in a lighter sentence.

You'll also hear from Leonard Horwitz, a former vice president of the Westchester Premier Theatre, who will tell you of his negotiations with the defendant Weiss in the $170,000 in cash which he personally delivered to the defendant Weiss at Warner Communications.

You'll also hear that Mr. Horwitz was convicted of conspiracy and stock fraud in connection with the sale of stock at the Westchester Premier Theatre. He was also convicted of obstruction of justice, for endeavoring to obstruct the same grand jury which the defendant Weiss is charged in this case with obstructing.

On these charges Horwitz was sentenced to three years in prison. This sentence was reduced to nine months because of his agreement to testify truthfully and cooperate with the government. Horwitz has served that sentence.

However, as part of his agreement with the government, Horwitz pled guilty to tax charges, exposing him to an additional possible eight years in prison. Horwitz has not yet been sentenced on those charges. He is hoping that his cooperation in this case will result in a lighter sentence.

Now, in listening to these witnesses, particularly accomplices, please keep in mind that they are the best possible witnesses that you can hear from. They participated in the

crimes with the defendant and are able to give you an inside view of what the defendant said and did.

On the other hand, please keep in mind that both of these witnesses have committed crimes. The question for you with respect to the accomplices is not whether they are bad people. It is not whether you like them. The only question for you at the end regarding the accomplice witnesses, is whether or not they are telling you the truth from this witness stand. In that regard, we ask you to make a very special effort to scrutinize each of these witnesses with caution and care and look at their proof in this case which supports what they have to say.

Finally, you will also hear from other witnesses who are not accomplices, but who were simply privy to certain information which is relevant to this case.

Now, based on this criminal conduct which I outlined for you, defendant Weiss is charged with specific crimes in an indictment.

Now as Judge Lowe told you yesterday, an indictment is nothing more than a legal instrument setting forth the criminal charges, which brings this defendant into the courthouse.

At the conclusion of this trial, Judge Lowe will instruct you, as she already has instructed you, that you will be given very thorough instructions on the meaning of each of these crimes charged in the indictment.

Now, however, I would just like briefly to touch upon each of these charges, just so you know what they are.

The defendant Weiss is charged with participating in the affairs of Warner through a pattern of racketeering.

What is a pattern of racketeering? Pattern of racketeering is legally defined as two or more violations of certain criminal statutes within a ten-year period.

In this case, there are two criminal statutes charged as constituting the pattern of racketeering.

First, the defendant Weiss is charged with 13 acts of mail fraud, his role as the banker and fraudulent scheme to defraud Warner's shareholders.

Second, the defendant Weiss is charged with one act of obstruction of justice for endeavoring to obstruct the grand jury's investigation.

The defendant Weiss is also charged with the separate crime of mail fraud for his participation in the fraudulent scheme and for perjury for lying to the grand jury.

Finally, defendant is charged with the preparation of false corporate tax returns for Warner.

Now, the questions which you must decide in this case are fairly straighforward and fairly simple. First, did the defendant Weiss participate in the affairs of Warner Communications through a pattern of racketeering.

Second, did the defendant Weiss participate in a scheme to defraud the Warner shareholders.

Third, did the defendant Weiss lie before the grand jury.

And fourth, did the defendant Weiss assist in some fashion in the preparation of false corporate tax returns for Warner.

Although the questions in this case are extremely simple, this case is extremely important. It is important to the defendant, who is charged with the commission of serious crimes.

Equally, it is important to the government.

The enforcement of the criminal laws with respect to white collar corporate offenses is a matter of concern to our community. Ultimately, it is in courtrooms like this where that interest is protected.

Excerpt from Cross-Examination of Leonard Horwitz, November 4, 1982

Q. Let me read you paragraph 7A of the indictment.

"That on or about May 29, 1973, the defendant Solomon Weiss—" that's him—Secretly and fraudulently"—

THE COURT: Slow down.

MR. KASANOF: "took a $50,000 cash bribe and extracted a promise of an additional 50,000 in cash to be paid at a subsequent time and in return for which the defendant Solomon Weiss promised to arrange for Warner to purchase 20,000 shares of the theater stock."

Q. That's the incident which you're describing in your testimony, isn't it?

A. Yes. I'm just not sure of the legal language of the word "bribe."

Q. You don't understand what a bribe is?

A. Not exactly. If it pertains to a corporation or an individual, I have the general idea of what it is. It's an illegal payment. But other than that, I don't know the exact definition of the word "bribe."

Q. Let's see if we can talk about that for a moment. Would you say it's a fair description of a bribe that you give someone money to do something corrupt for a corrupt purpose, to violate a duty?

A. My best definition would be that it's an illegal payment to induce—my uncertainty is as to whether this pertains to a corporation, as to whether it's an individual. It's my feeling that the company got this money, not Mr. Weiss, personally.

Q. You don't see the company sitting anywhere in the courtroom, do you? Mr. Weiss is on trial here.

MR. KASANOF: Will the U.S. Attorney stipulate that the company is not a defendant under this indictment?

MR. AKERMAN: Stipulations are to be taken outside the presence of the jury.

MR. KASANOF: All right.

Q. Will you take it from me, sir, that the company is not charged with a criminal offense?

A. I will take it.

Q. On this or any other indictment?

A. Right.

Q. It's Mr. Weiss we're talking about.

A. Yes.

Q. Let's go back a little.

Did you tell anyone that Jay Emmett was living high and you thought he would go for this deal, because he needed the money?

A. No sir.

Q. And if such testimony was offered by the United States in a trial, that testimony was false testimony?

A. Yes, sir.

Q. You never said that? Okay.

A. I never said that, no, sir.

Q. Never said it to anyone. Very flat and unequivocal.

Excerpt from Cross-Examination of Jay Emmett, November 10, 1982

A Mr. Ross was the chairman of the board and chief executive officer. There were three members of the office of the president. And those three members had responsibilities for various different divisions of the corporation.

Q You spent an enormous amount of time with Mr. Ross, didn't you?

A I spent a good deal of time with Mr. Ross, yes.

Q Played backgammon with him.

A Yes, sir.

Q He was making a great deal more money than you were in '73.

A I'm—I can tell you what I was making and I suspect I can tell you what he was making if that would help you, Mr. Kasanof.

Q No, just answer my question, if you can.

If you can't —

A He certainly was making more money than I was, Mr. Kasanof. Yes, sir, he sure was. I just hesitate about your adjective of great.

Q Take out "great deal."

He was somewhere up there and your were somewhere down there in life's economic ladder is that right?

A Yes, sir, no doubt.

Q He also was the controlling, running figure in the company.

A Without question, sir.

Q And you were at his right hand.

A I was—

Q At his right hand.

A At his right hand, if you want to say so.

Q And Sol Weiss was one of the dozens of low-level or lower level functionaries.

A Sol Weiss was at his right hand much of the time, sir.

Q As a manager and organizer of that company, as a director of its business activities?

A No, but as an overseer of Mr. Ross' personal funds, as he was mine.

Q Oh, yes, let me for a minute change something. Let's go into the check which says "attorney in fact."

Mr. Weiss is not a lawyer, is he?

A Not to my knowledge, sir.

Q An attorney, in fact, merely means that he had a power of attorney, written authority to sign your name on your checkbook.

A Absolutely, sir.

Q And that check you know—did you tell Mr. Weiss or did anyone tell Mr. Weiss that that was a gambling check?

A I don't recall.

Q You just told him to sign it or had someone tell him to sign it?

A I don't even recall about that particular check, no sir.

Q Now, your testimony is that this money went to the Warner cash fund? Your testimony.

A Which money? You're on so many different subjects. Power of my attorney?

Q I apologize.

THE COURT: Just a minute.

MR. KASANOF: I apologize. That's perfectly all right.

Q Let's go back to the vicinity of Mr. Horwitz and the series of events which followed thereafter.

Your testimony is that—well, is it your belief that Mr. Sol Weiss got or kept any money?

A My belief is that Mr. Weiss got the money. My belief is that he didn't keep it.

Q And that it went to the Warner cash fund.

A Yes, sir.

Q Is it your belief that Mr. Ross got the money?

A I don't know where the money went, sir.

Q It went to the Warner cash fund.

A That's what I was told.

Q Now, sir, did you ever turn to Mr. Ross then or ever in the ensuing years and say to him, "Mr. Ross, what is this Warner

cash fund? What's going on with this money from Westchester Premier Theater? What are we doing?"

Did you do that?

A No, sir.

Q Did you ever have any other conversation with him about it, other than that day?

A No, sir.

Q And you were a president of this company, one of the three in the office of the president?

A Yes, sir.

Q And did you ever turn to your other co-presidents and say to any of them, "Listen, there is a cash fund. What do they do with that cash fund?"

Did you?

A No, sir.

Excerpt from Trial Transcript,
November 15, 1982

THE COURT: But we are talking about the jurisprudential validity of withdrawing from a jury the factfinding determination of an element of a crime.

MR. AKERMAN: Well, I must say I am not prepared to argue on that. I simply stand by the circuit rule. As has been done in every single case, the Supreme Court has denied cert in all of these cases.

THE COURT: Did it grapple with this issue or was it en passante?

MR. AKERMAN: It just didn't grapple with it. It was cert denied. But it is our position that the rule of the circuit is the rule and that's what should be applied here.

THE COURT: All right, well, let me say this. I am an inferior court and am aware of the obligations of an inferior court to obey clearly the delineated rule of the circuit, and I will do that. But for the record I am certainly going to say that I am doing it because of my judicial obligation and not because I am convinced that it's an appropriate ruling, and I would certainly encourage Mr. Kasanof in the event that there is a conviction that this matter be appealed all the way up to the United States Supreme Court where they can directly confront an issue such as this, which I feel is a serious infringement on the right of a trial jury in a criminal case to determine whether or not the government has proven each and every element of the crime beyond a reasonable doubt.

In following the circuit's rule, I must make a determination under what Judge Moore has called a broad construction of the term "materiality" and a broad construction of the grand jury's investigative function which in cases the grand jury's investigative function goes to the outer limits of law enforcement.

So, we are not dealing with a very, very limited discrete idea, but we are dealing with the broadest concept, the investigatory function of the grand jury. And if one must determine materiality in that context, anything which touches or hinders that very broad concept as a matter of law must be deemed material, and the Court must charge the jury that this element of the crime, as a matter of law has been decided, then I think we are juxtaposing traditional due process concepts of criminal trials, guilt beyond a reasonable doubt as to every limit, with judge-made law.

And Mr. Kasanof, I have expressed this opinion before. It is not new to Mr. Akerman. I certainly think it deserves a very close look by the Supreme Court and I have no problem in saying it. I am constrained to find materiality in this case according to the standards of this circuit but only because of the position I hold as an inferior judge.

That's the way I see it.

Excerpt from Direct Examination of Solomon Weiss
November 17, 1982

Q. Did you decide that the company ought to buy the Westchester Premier Theatre stock?

A. No, I didn't.

Q. As far as you know, whose deal was the purchase of Westchester Premier stock?

A. Mr. Emmett's.

Q. And did you—was there a reason why you prepared Government's 1?

A. Yes.

Q. What was the reason?

A. He instructed me to.

* * *

Q. Do you see Government's Exhibit 39, dated July 5th?

A. Yes, I do.

Q. Would you read it aloud and tell us how you came to write it?

A. "July 5, 1973, Mr. Leonard Horwitz, 266 Old Range Road, Wilton, Connecticut.

"Dear Len: I am still awaiting a bill from Dennis Konner, Esq., for the services he rendered up to date. I do not want to hold them up any longer, now that Jay has agreed to the fee.

"Very truly yours, Solomon M. Weiss."

Q. Mr. Weiss, how, if you recall, how did you come to write that letter?

A. I was instructed by Mr. Emmett to be in touch with Mr. Len Horwitz to obtain the bill for the services that were owed to Mr. Dennis Konner for his work that he did in the TVC acquisition for Warner Communications.

* * *

Q. Does it appear that you requested a check before you got the bill?

MR. AKERMAN: Your Honor, I object to the leading of the witness.

THE COURT: Yes, sustained.

Q. Is the date of the check request earlier in time that the date of the letter?

A. Yes, it is.

Q. Can you tell us how that came about, if you know?

A. I was instructed to draw a check.

THE COURT: Instructed by whom?

THE WITNESS: By Mr. Emmett to draw the check for $30,000 and await for a supporting document.

* * *

Q. Will you describe for us in terms of whether you had a purpse as a co-venturer in a scheme to defraud or whether you did not have such a purpose; will you tell us how you acted in relation to the documents of Konner, Kosman, Horwitz?

A. My only role in the entire thing was to prepare a request for checks.

Q. And were you acting in furtherance of a scheme to defraud?

A. No, I was not.

Q. And basically at whose direction, if anyone's were you acting?

A. At Mr. Jay Emmett's direction.

Excerpt from Government's Closing Statement
November 22, 1982

At Weissman's urging, Horwitz met with Emmett at Emmett's office at Warner Communications in Manhattan and brought with him the $50,000 in cash in a brown paper bag which had been given to him by Elliot Weissman in Scarsdale.

Now, at Emmett's office, Horwitz presented to Emmett the offer which Weissman had proposed. The theater would lend Emmett $50,000 in cash, Emmett would add 25,000 in cash of his own money and then personally buy 10,000 shares of Westchester Premier Theater stock.

Mr. Emmett, in meeting with Mr. Horwitz, turned this offer down. He was simply not interested, because as you recall, a year earlier, he had bought 10,000 shares of seed stock for only $15,000 and simply did not want any more Westchester Premier Theater stock, particularly stock that was selling at a higher price than what he had paid for a year earlier.

Now, Mr. Emmett told Mr. Horwitz that although he was not personally interested in the offer proposed by Elliot Weissman in the Westchester Premier Theater, he told Horwitz that the company might be interested in this particular offer.

Now, Jay Emmett left Mr. Horwitz in his office and then went to visit Steven Ross, the chairman of the board of Warner Communications in his office. As you recall, Mr. Emmett told Mr. Ross that Horwitz was in his office and that the theater was experiencing problems in selling the stock, that the Westchester Premier Theater had offered him, Emmett, a $50,000 loan to buy 10,000 shares of stock in the theater, but that he was not interested.

Mr. Emmett then asked Mr. Ross would the company be interested in this particular deal. Mr. Ross told Mr. Emmett that the company couldn't take a loan to buy stock in a public company, but that perhaps Horwitz could meet with Sol Weiss and that maybe Horwitz could be helpful in the Warner cash fund.

Emmett left Ross' office, contacted Solomon Weiss, told him of his conversation with Ross and introduced Solomon Weiss to Leonard Horwitz.

At that time, the defendant Weiss was an officer at Warner with the title of assistant treasurer.

Mr. Emmett made the introduction and Mr. Horwitz went alone with Mr. Weiss in a small anteroom. Mr. Horwitz put the brown paper bag containing the $50,000 in cash on a round glass table.

Horwitz explained to Mr. Weiss that he had offered this $50,000 in cash to Jay Emmett as a loan, so that Emmett could purchase 10,000 shares of the Westchester Premier Theater stock after adding $25,000 of his own money and that Emmett simply wasn't interested in this particular proposition.

Weiss then told Horwitz that the company would be interested, since it always had a need for cash. Weiss sat down at the glass table and counted the cash. Weiss excused himself thereafter and said to Horwitz that he would be back in a few minutes.

At that point, Horwitz asked Weiss if he was going to see Steven Ross, the chairman of the board, and Weiss explicitly instructed Horwitz that Ross' name wasn't to be used.

Now, five or ten minutes later, Mr. Weiss returned and made a counteroffer to Horwitz, counter to what Horwitz had proposed to Jay Emmett for his own personal use.

Weiss said, that instead of buying 10,000 shares of Westchester Premier Theater stock, Warner would buy 20,000 shares of Westchester Premier Theater stock, thereby doubling the amount of stock that would be bought.

Instead of the theater loaning $50,000 in cash, the theater would give Warner Communications $100,000 in cash, as an outright payment for Warner buying the stock.

Now, Horwitz was delighted with Weiss' offer. He telephone Elliot Weissman, the president of the Westchester Premier Theater, secured his approval for the deal and accepted Weiss' offer made on behalf of Warner.

At that time, Horwitz turned over to Weiss the $50,000 in cash in the brown paper bag and promised him that Warner would receive an additional $50,000 in cash.

Now, on May 30, 1973, Warner, in fact, purchased 20,000 shares of Westchester Premier Theater stock. And you have the check request, Government Exhibit 1, and you have the check that goes to Cannon & Jerold, which was the stock brokerage firm that was handling the public offering of the Westchester Premier Theater stock.

At this time, I would like to remove the first portion of this chart, which simply sets forth and summarizes for you the evidence that came in on this matter.

Mr. Weiss, on behalf of Warner, promised to purchase the 20,000 shares of Westchester Premier Theater stock. The Westchester Theater at that time represented by Leonard Horwitz, gave the defendant $50,000 in cash, promised an additional 50,000.

Thereafter, May 30th, the defendant Weiss initials request for check to purchase the theater stock. The check goes to Cannon & Jerold, the stock brokerage company, and Warner, in effect, buys the stock.

Now, let's direct our attention to this particular exhibit, Government Exhibit 1, which is the request for check.

First of all, there is no dispute that this request for check was prepared by Solomon Weiss. The red initials which appear on the bottom are the initials of Mr. Hardy, who the evidence showed, is simply a clerk and initialed this check request to confirm that the form was properly filled out.

The approval is by Bert Wasserman. The other investments and the writing "Okay per Jay Emmett," is also the writing of Bert Wasserman.

Now, as to the "Okay per Jay Emmett," neither Emmett nor Wasserman specifically recall this particular matter. Wasserman said that Emmett probably told him that the stock purchase was okay, and Mr. Emmett testified that if he had been asked about his matter by Mr. Wasserman, that, indeed, he would have said that the stock purchase was okay.

Now, at this juncture, Mr. Weiss tries to extricate himself completely from this fraud by simply claiming that Emmett instructed him to prepare the request for check, Government Exhibit 1, for the Westchester Premier Theater stock.

And he said before you in his testimony, and I quote, "My only role in the entire thing was to prepare a request for check."

Now, I ask you to follow me through the evidence, because the falsity of this statement is proved by the evidence.

First of all, Linda Horns testified that in 1973, Weiss dealt with Horwitz on Warner's investment in the Westchester Premier Theater. She testified that Horwitz came by twice a week, that he telephoned Weiss at that time four or five times a week.

On cross-examination, Mr. Weiss had to acknowledge that his secretary was telling the truth.

Now, if the defendant Weiss' role in Warner's purchase of stock was simply to prepare a request for check at Jay Emmett's instructions, a matter which would have taken all of two minutes, I might add, why, why I ask you, would Leonard Horwitz be involved in this matter in dealing with the defendant Weiss on such a regular basis?

Why, I ask you, and I ask Mr. Kasanof to address this when he gets up, why would Leonard Horwitz be coming by, making calls on a regular basis, if Mr. Weiss' only role with respect to that first stock purchase was just to fill out this particular check request?

There is obviously no reason for Horwitz to be dealing with Mr. Weiss on this stock investment if Mr. Weiss' only role was simply to act as a clerk and fill out a form.

Now, the evidence of Mr. Weiss' statement now that Mr. Emmett instructed him to do it is also directly contrary to his testimony in the grand jury on April 10, 1978. He was asked at that time:

> "Q Who was it that asked you to fill out the request for check?
>
> "A I do not know, sir."

The questioning goes on:

> "Q Was it Mr. Emmett?
>
> "A Possibly."

And further he is asked:

"Q Do you know who it was that approached Warner Communications to ask them to buy this stock?

"A I do not."

At another point Weiss is asked:

"Q In other words, you have no recollection as to who it was that approved the purchase of the stock?

"A That's right."

And later he was asked:

"Q You also have no idea, is that right, as to how it was that Warner Communications came to buy the 20,000 shares of Westchester Premier Theater stock?

"A That's right."

I submit to you that this change, this sudden change in recollection, is easily explainable.

In 1978, when Jay Emmett was in the Warner fold, and a team player, Weiss sought to distance not only himself from these transactions, but also Jay Emmett. And it was his motive at that time to make this appear as an ordinary business transaction, both from his standpoint and from Mr. Emmett's standpoint.

Now, that Mr. Emmett has turned State's evidence, Mr. Weiss must and therefore has to shift all the blame to Jay Emmett.

Now, moving on through the evidence. As you recall, there was public offering of the Westchester Premier Theater stock closed in mid-June of 1973. And a short time after the closing of the public offering, Mr. Horwitz spoke to Mr. Weiss about the $50,000 in cash that was still owed to Warner Communications.

Now, Mr. Weiss asked Horwitz for this $50,000 that was still owed to the company. And Mr. Horwitz told him that the Westchester Premier Theater simply didn't have the $50,000 in cash.

Now, after some discussion back and forth between Mr. Weiss and Mr. Horwitz, the deal was modified. Instead of

delivering $50,000 in cash to Warner Communications, Mr. Weiss was to deliver $20,000 in cash and Warner Communications was to issue to theater representatives, $50,000 in checks.

Now, that is precisely what occurred, and that is reflected on the bottom portion of this particular chart.

And let me go through with you each of the items that are reflected on there.

On July 3, 1973, after the promise is made to deliver 20,000 in cash and Mr. Weiss agrees on behalf of Warner to issued $50,000 in checks, on July 3, 1973, Horwitz delivers to Mr. Weiss at Warner Communications, $20,000 in cash.

Now, the evidence—Mr. Horwitz' testimony was that he obtained this $20,000 in cash from Norman Brodsky and in fact, Norman Brodsky's account shows that on July 3rd, of 1973, this is the account for the law firm of Konner and Brodsky, that the account was overdrawn by over, a little over $20,000.

This is a document that came in a little bit after we had shown you the first batch of documents, and is one you have not seen up to this point.

Now, on the same day that Horwitz delivered this $20,000 in cash, Mr. Weiss gave to Leonard Horwitz two checks. One was a $30,000 check made payable to the Westchester Premier Theatre, and the other was a $20,000 check made payable to Leonard Horwitz. And both of those checks are in evidence before you. The check to Horwitz has been received as Government's Exhibit 8, and the $30,000 check to Westchester Premier Theatre has been received as Government's Exhibit 17.

As to the $20,000 check, that was made to Leonard Horwitz, Horwitz took that check and opened a bank account at Bank Leumi, the very same bank that Norman Brodsky used to get the $20,000 in cash, and deposited that check into an account at Bank Leumi.

* * *

Now, you'll notice up here it just says consultant fee. Nothing about real estate. Nothing about Jungle Habitat. And

that is because of the questioning by Al Sarnoff. Instead of leaving the approval blank this time, the defendant Weiss has Caesar Kemmel put in his initials.

Now, who is Caesar Kemmel? We know from the evidence that in January of 1974, Caesar Kemmel is the executive who approved this payment as an exeeuvite in Warner, who is above Jay Emmett. He is also an individual who is more closely tied to the Warner family than Jay Emmett ever was.

Now, you heard Mr. Weiss, himself, admit that he had known Caesar Kemmel for over 25 years, going back to the time when the defendant worked for an accounting firm which serviced the Kinney Corporation.

In contrast, the defendant Weiss has known Mr. Emmett for a much shorter period of time.

This is significant because if Mr. Emmett was simplying stealing the money, as Mr. Kasanof would have you believe, why wasn't Jay Emmett the officer approving this particular request for check? Why was it being approved by an officer who is higher up in the corporation?

In fact, the evidence shows that Jay Emmett had nothing to do whatsoever with this transaction. Instead, it was approved by Warner executive with greater authority than Emmett, and with a much longer standing relationship with Weiss.

The answer is simple. The answer is that the reason another executive was approving it is because it was for the Warner cash fund.

Now, you also know that this particular check doesn't go to Jay Emmett, but it goes to Linda Horns, whose name is checked off here with, will call, with her telephone number and also instructions that the check be drawn April 1, 1974, which in effect happens, the check is drawn, $10,000 in Leonard Horwitz for no services whatsoever for April of '74.

That particular transaction is represented on this portion of the chart, showing the $5,000 in cash which Mr. Horwitz testified was delivered to Mr. Weiss and the receipt of the $10,000 check.

Now, the next event which occurs in this sequence comes in 1975, and that is, on January 14, 1975, Horwitz again goes to

the bank, Dutchess Bank & Trust Company with Mr. Neissen and Mr. Neissen borrows $15,000. And we know that because of the loan agreement which is before you in evidence, Government Exhibit 77.

Now, the day after that loan agreement is made out, January 15, 1975, the defendant Weiss prepares a check request, this time he has Jay Emmett sign off on it, and has the check delivered to himself.

You will also notice that with this particular request for check, it just says consulting services, just as the one that was signed by Mr. Emmett now says consulting services, nothing about real estate, nothing about Jungle Habitat, keeping it vague, keeping it broad, so that Al Sarnoff, the treasurer wouldn't ask too many questions.

Now, again, between January 15th and January 17th, Horwitz delivers the $15,000 in cash he borrowed from Mr. Neissen and picks up the check, Government's Exhibit 79, a check for $25,000. Again, no legitimate work is done. Mr. Horwitz takes that check, deposits it into his bank account, Government Exhibit 83, and thereafter takes out money, using a number of checks to cover up this transaction, to hide the transaction, and pays back his cousin Seymour Neissen the $15,000.

And that brings us to the third portion of the chart, which is the next check and cash which is reflected.

Excerpt from the Court's Charge to the Jury
November 23, 1982

The indictment charges that the fraudulent scheme existed on or about January 1, 1973, and continued to the date of the indictment, September 16, 1981. It is not essential that the government prove that the scheme to defraud started or ended on or about those specific dates.

It is sufficient if you find in fact a fraudulent scheme was formed and existed at sometime during the period set forth in the indictment.

Now, the government contends that the fraudulent scheme was the creation of a cash fund at Warner. The defendant, Mr. Weiss, testified that he never knew of or participated in any such scheme, nor did he have any knowledge of a secret cash fund or a cash fund of any kind as alleged in the indictment.

If you have not been convinced beyond a reasonable doubt that there existed a cash fund at Warner as alleged in the indictment, you need go no further in your deliberations under Count 1, and must return a verdict of not guilty under that count.

The same rule applies to Counts 2, 3, 4 and 5 of the indictment, for if you find in either Count 1, the 13 acts, or the four substantive counts of the indictment, that the government has not proven beyond a reasonable doubt that the cash fund alleged in the indictment existed, then the government will not have proven that essential element of the crime of mail fraud.

On the other hand, if you do find beyond a reasonable doubt that the government has proven that a cash fund as alleged existed at Warner, then you must go on to deliberate upon a second element of the offense of mail fraud.

And if you will look at our board: Scheme to fraud, the first element, the cash fund.

Excerpt from Trial Transcript
November 24, 1982

THE COURT: All right, good afternoon.

THE JURORS: Good afternoon.

THE CLERK: Madam Forelady, I show you what's been marked as Court's Exhibit W and ask you if if that's your signature.

THE FORELADY: Yes.

THE COURT: The note reads as follows:

"The jury requests the testimony of Mr. Weiss regarding how and when he first met Mr. Horwitz.

"We would also like the testimony regarding Mr. Ross' appearance before the SEC."

All right, Mary, would you begin, please.

(Read)

THE COURT: All right, members of the jury, you may retire.

(Jury left the courtroom at 3:55 p.m.)

THE COURT: We are in recess.

(Recess)

(In the robing room at 5 p.m.)

THE COURT: Off the record.

(Discussion off the record.)

(At the bench at 6:05 p.m.)

THE COURT: Let's make it on the record and we can make it again in open court, if you feel you want to do it in open court after the jury has been in.

I think it's more appropriate here, because we have not formally identified the note from the jury, so that you will give me—this is in the nature of you telling me what your position will be, whatever I rule.

MR. KASANOF: Your Honor has indicated to all counsel that at about 5:50, your Honor received a note from the jurors stating that they are unable to reach a unanimous verdict on any count.

We believe this jury has a carefully established record of meticulousness and care and that their expression should be respected and your Honor should declare a mistrial at this time.

Failing that, your Honor—and your Honor has indicated in our informal argument before your Honor that is not likely to be persuasive. Failing that, we ask, with all the force we can muster, that your Honor inquire of the jury whether it believes that additional deliberation would be fruitful.

And if the jury does not report that additional deliberation would be fruitful, but rather reports that additional deliberation would not be fruitful, we ask that your Honor discharge the jury.

We do not think that the time of discharge is properly measured by minutes or hours. This jury has deliberated yesterday till 10 o'clock. It has deliberated all day today. Its questions reflect a range of interest through the course of the indictment. And we believe if it reports that it is not going to be fruitful advance by further deliberations, any other verdict will be the product of coercion.

This case is a close case by any measure. And we are urgently trying to prevail upon your Honor to prevent it being tipped into a verdict by direct or implicit coercion.

We believe that the jury should be discharged.

MR. AKERMAN: Can I respond?

THE COURT: Let me just say this so I don't unintentionally mislead Mr. Kasanof by a statement I made.

When you said that you would like me to put the question to the jury, do they believe that further deliberations will be productive, I said to you that question has been approved.

I believe, there is a peroration to the question, which essentially is, telling the jurors that in terms of this case, it has

taken approximately a month to try this case. They have been deliberating approximately two days. Then do they believe, in view of the time taken to try the case, that if they deliberated further on Friday, such deliberations would be fruitful.

MR. KASANOF: I would take exception to that, because it doesn't seem to me that the question of how long—the question is whether a free will, a reasoned discussion is going to be fruitful.

There is no more duty on a jury to return a verdict when it is needless and disregardful of their consciences after a month or a week or a year. And a verdict—they don't owe a duty to return a non-conscientious verdict to the government.

THE COURT: I agree.

MR. KASANOF: And I'm fearful—

THE COURT: Or to the defendant.

MR. KASANOF: Or to anyone, Judge.

Oh, no, Judge, I don't see that that is a relevant peroration.

THE COURT: If the peroration doesn't go the question doesn't go.

MR. AKERMAN: I say if there is any pressure here, it's because of the holidays. This jury has not been deliberating that many hours. They started late yesterday. I think that the pressure of the holidays has obviously made them feel that they have to come in with a decision before the holidays start. I think it just makes sense to bring them back Friday. Nothing has to be said and just let them go ahead.

I think if this note comes in Friday, then perhaps, the procedure that Mr. Kasanof suggests would be appropriate. But it's just too soon to do that.

THE COURT: When did I furnish the charge to the jury?

MS. ALEXANDER: 2 o'clock, Judge.

MR. KASANOV: I don't believe—I would like to have the reporter or the clerk's answer. That's not—

THE COURT: Mr. Akerman is objecting to something.

MR. AKERMAN: They simply didn't start deliberating until after 3 o'clock. So to say that we have had two days of deliberations is far from the fact.

Plus I think they started late this morning, if I am not mistaken. I was told that the last one was here after 11.

THE CLERK: 10:30.

MS. ALEXANDER: So six hours yesterday and seven today.

MR. AKERMAN: Considering the length of the case, it's not enough time.

THE COURT: It's my feeling that they have not deliberated long enough. The question is what communication should I make to them? I think in view of all the discussion, I think no communication is the best one, and to tell them to come back Friday morning, because I do believe they have not deliberated for a sufficient length of time.

Mr. Kasanof, your exception is noted on the record.

MR. KASANOF: Let me press my exception, because I think it is—your Honor, I say this with deference to your Honor. I think that your Honor's failure to respond to the jury's note is squarely contrary to the cases and to the common sense doctrine that the jury looks to the court for its guidance. And they have told you about something, and when they find that their report to you is being ignored, they will be baffled and coerced.

I think your Honor, we are entitled to know whether they think further deliberation will be fruitful. And with deference—in fact, let me withdraw the words "with deference" as to my adversary Mr. Akerman. I don't think Mr. Akerman's opinion as to whether deliberation is lengthy enough is of consequence. And with deference, your Honor, I think that your Honor's judgment ought to be exercised on an informed reply from the jury, which I think is indispensible to your Honor's making that judgment. This is not a mathematical formula, and I think it departs from the whole relationship that this jury had, which has reported with care and conscientiousness.

Now, I would like the clerk, not counsel, to state for the record, the times of the jury's deliberation. My recollection is that your Honor finished the charge somewhat earlier, and

then they went to lunch and came back and started deliberating. But I would like a reference when they started deliberating yesterday.

THE CLERK: I'm sorry, Mr. Kasanof. I don't have a record of that. I can tell you what time they were assembled this morning, which is 10:35. And they began their deliberations.

I am trying to remember as far as the first day. I know it was well after 2 when I got to lunch. And that was shortly before that when the jurors went to lunch with the marshals. They didn't begin deliberations until they returned from lunch.

Perhaps the marshal would help us.

* * *

THE COURT: Let me bring them out and I will do what I think is right.

That's all I can do. And it may not please either one of you.

MR. KASANOF: Your Honor will understand, so I don't want—this is a point of vital interest to the defendant and his right to a jury trial, and we are specifically asking that your Honor, before doing anything else, ask the simple question whether they think further deliberations will be appropriate.

And we will take respectful but urgent exception to your Honor doing anything else until you have that report.

It may be that Mr. Akerman is right, as a jury psychologist, and they will say, "Well, Judge, perhaps if we had another few hours," or it may be something else.

But I don't see what—

THE COURT: I will have to poll them.

MR. KASANOF: As to what?

MR. AKERMAN: This is just the wrong time.

MR. KASANOF: No, you can let them go back and report through their foreman.

THE COURT: All right, I'll do that.

All right, bring the jury out.

(Jury entered the courtroom at 6:22 p.m.)

THE COURT: Show the note to the foreperson.

THE CLERK: Madam Forelady, I show you what's been marked as Court Exhibit E and ask if that is your signature.

THE FORELADY: Yes.

THE COURT: All right, the note reads as follows:

"The jury believes that they are unable to come to a unanimous decision on any of the counts."

Now, members of the jury, when you were selected, we all were aware of the Thanksgiving holiday tomorrow. And I have that in my mind. I know some of you must.

I believe that this case has taken a long time to try. There are many issues, issues that are important to both the government and to the defendant. And both sides have a right to expect that the issues be decided by a jury that makes every effort to go over the case and all parts of it and arrive at a decision which speaks the opinion of each and every juror.

No juror should be coerced one way or another because of time or anything else.

It is my judgment, and mine alone, that I think you should deliberate further in this case. And for that reason, I am going to say this to you, that the limousines are here to send you home tonight. I will not expect any juror to deliberate on a holiday, Thanksgiving tomorrow. But I would plan to have you come back to court on Friday.

Now, I am going to ask you to retire to the jury room and decide among yourselves this question. If you continue your deliberations on Friday, does the jury believe that it would be able to arrive at a verdict?

You may retire and send me a note.

(Jury left the courtroom at 6:25 p.m.)

THE COURT: Gentlemen, that's the way I felt about it and everybody has an exception.

MR. KASANOF: First—I think I got a little steamy and I want to apoligize to Mrs. Alexander, who caught some of the tension in the courtroom—

MS. ALEXANDER: I accept.

MR. KASANOF: —with my earlier remarks and I try not to let that happen and I apologize.

MS. ALEXANDER: I accept your apology.

THE COURT: I think that's nice.

MR. KASANOF: Well, it's embarrassing, Judge, but it's been a hard day.

THE COURT: It's a hard day.

MR. KASANOF: And it should not fall on other people. It should fall on my immediate family when I get home, as it will, I'm sorry to say.

Your Honor, with respect, you said you departed from the simple putting of the question. We take a respectful but urgent exception.

And we hope that your Honor has a very pleasant and fruitful Thanksgiving.

THE COURT: Don't leave yet. We are going to get an answer to your question.

* * *

THE CLERK: Madam Forelady, I show you what has been marked as Court's Exhibit Y and ask if that is your signature.

THE FORELADY: Yes.

THE CLERK: Court's Exhibit Y reads as follows:

"The Jury has agreed to continue to deliberate on Friday at 10 a.m."

Excerpt from Trial Transcript
November 26, 1982

United States of America

v. 81 Cr. 636

Solomon Weiss

New York, New York
November 26, 1982
10:30 a.m.

(Proceedings resumed)

THE COURT: Mr. Achlufi and Mr. Kistner were both here very early this monrning, and Mr. Kistner was excused by me a few minutes ago, so that he could make his train for his 2-hour trip back home.

And Mr. Achlufi was good enough to wait to put everything on the record.

And all of our jurors are here and deliberating, Mr. Achlufi. I don't know whether or not we might be needing you tomorrow, but in the event we do, we will give you a call.

MR. ACHLUFI: Okay. I got that emergency call first time in my life.

THE COURT: Thank you. You are excused.

MR. ACHLUFI: Thank you.

THE COURT: 10:20 all jurors had arrived.

All right.

MR. KASANOF: Where is your Honor going to be?

THE COURT: Upstairs in my chambers.

MR. KASANOF: Thank you.

THE COURT: I will be available.

The only thing they sent out for nourishment, for orange juice and things, but nothing of substance.

(Recess)

(At the bench, 10:40 a.m.)

(Discussion off the record.)

MR. KASANOF: May we be excused, your Honor?

THE COURT: Certainly.

(Recess)

(At the bench)

MR. KASANOF: We would ask your Honor, essentially, to respond by some form of words, telling them that there is evidence and it's either there or not as your Honor suggested in the informal—

THE COURT: That was a non sequitur. You left it flying up in the air.

MR. KASANOF: Strike it all.

Your Honor has indicated to us at our informal discussion at the bench that you propose to tell them that the evidence is there on the question of CPA.

THE COURT: No.

MR. KASANOF: I'm sorry.

THE COURT: There has been testimony that Mr. Weiss is a CPA, but that there is no evidence as to what a CPA is.

MR. SCHWARTZ: I'm not sure that he testified he is a CPA. Because didn't you chide us for not having that.

MR. AKERMAN: No, he did testify that he is a CPA.

THE COURT: But there is no evidence what a CPA is and they must decide this case on the evidence or lack of evidence as they find it, and they are not to be detectives and engaged in guess work or speculation. Period.

MR. KASANOF: Fine.

THE COURT: That's all that you can do where they are asking for information that is not in the record.

MR. AKERMAN: One other point. Certainly, if someone, if they know what a CPA is from their own life experiences —

THE COURT: I don't get into life experiences. If they say, as they have said here, "Some of us are unfamiliar with the nature and training of a CPA," they obviously want me to explain to them what a CPA is. I cannot do that.

MR. AKERMAN: The way I read it is there may be some other jurors who are familiar with what a CPA is and certainly that's a fact in the record and they are to do with it as any

other fact in the record, to consider it to whatever weight they want to give it. You see I'm saying some jurors may know what a CPA is.

THE COURT: You're speculating now.

MR. AKERMAN: That's right. That's the problem with the note.

THE COURT: I will not speculate. I will stick strictly with what the note is and I will tell them I don't understand the latter portion.

All right, would you bring the jury in, Kathy?

(At 11:00 a.m., jury entered the courtroom)

THE COURT: All the survivors of the turkey festival.

JUROR NO. 12: And imitation turkey.

THE COURT: That's right, vegetarian.

All right, Marshal, would you show this to the foreperson of the jury and ask her if that is the jury's note.

THE MARSHAL: Is this the jury's note?

THE FORELADY: Yes.

THE MARSHAL: Yes, your Honor.

THE COURT: Thank you.

That note has been marked Court's Exhibit X.

And it reads as follows:

"This jury has been directed to use —"

All right, this should be Exhibit Y, rather than X.

It reads as follows:

"The jury has been directed to use its best unbiased judgment and common sense in reaching a verdict on a series of counts outlined to us. Our ability to do this fairly is dependent upon our varied, collective experiences. Most of us are unfamiliar with the nature of the training of a CPA." Underlined. "Mr. Weiss is a CPA.

"Question, period, for question: Is this jury entitled to know what a CPA is, as opposed to bookkeeper, lawyer versus legal aid, M.D. versus paramedic, dentist versus dental tech."

A line is drawn and under the line is: "Re unerlined (Xerox), sentences, Meigs and Meigs.

"Charles Sutherland, J3," and signed by our foreperson.

As far as the inquiry that is above the line, the jurors must decide the case based upon the evidence or lack of evidence in the case. You cannot indulge in guess work, specualtion or surmise. There is no statement in the record as to what a CPA is, and that is what the evidence is, a lack of evidence of an explanation of what a CPA is.

As far as what is under the line on the paper, I don't understand what it means. So I will return the note to the jury, and if you will write a further note, if you desire, in explanation of what it means, "underline Xerox sentences," et cetera. We cannot figure out what that means.

So Miss Thompson, would you give the note to the foreperson.

And if you choose to write a further note ith further explanation of what tht inquiry is, we will be glad to help you.

You may retire.

(Jury left the courtroom at 11:05 a.m.)

(Discussion off the record.)

THE COURT: Any objection to my statement to the jury?

MR. KASANOF: None.

THE COURT: Mr. Akerman?

MR. AKERMAN: None.

THE COURT: Thank you.

(Recess)

(12:50 p.m. in robing room)

THE COURT: This is Court's Exhibit Z, as in zebra, which came in t 12:25 and says:

Excerpt from Trial Transcript
November 27, 1982

THE COURT: You see, you have testimony and you have documents. All of it is evidence, and they have a right to reject what they don't believe and look at what they do believe.

They certainly have the right to reject testimony that it was a fee and treated as an expense, and could find that it was a prepaid asset as apparently they have determined it to be from looking at the document. The question is whether it was—if it were a prepaid asset, as a matter of law, would it be treated as an expense. That's a very simple issue.

MR. Kasanof?

MR. KASANOF: I want to hear what Mr. Akerman has to say.

THE COURT: I don't know what the answer is, but that's my feel of it.

MR. AKERMAN: Here I have the portion,

Would you ask the foreperson of the jury if those are the jury notes?

THE MARSHAL: Madam Forelady, is that your signature?

THE FORELADE: Yes.

THE MARSHAL: And is that your signature?

THE FORELADY: Yes.

THE COURT: Thank you. Taking the first one first, that's Court's Exhibit AA.

Juror No. 12: The microphone, please.

THE COURT: You are so right.

Juror No. 12: Thank you.

The COURT: Court's Exhibit AA:

"In reference to Count 10, if the $10,000 consulting fee to Leonard Horwitz was treated as a prepaid asset, as indicated on the check request, rather than as an expense for that year, would that have any effect on this count which charges the $10,000 fee in full as an expense for that year?"

Members of the jury, counsel have both looked at the record, and I tell you that there is no evidence in the record as to how a prepaid asset would be treated.

The next note, Court's Exhibit AD, as in David, reads as follows:

"If the amount of fraudulently claimed fee of $25,00 under Count 11 is small in relation to the total income tax for that year, does that constitute a material matter?"

Members of the jury, that question is one for you to decide. All right, you may retire.

(Jury left the courtroom at 10:55 a.m.)

THE COURT: Mr. Akerman and Mr. Kasanoff, do either of you have any objection to my statement to the jury?

MR. AKERMAN: No, your Honor.

MR. KASANOF: None, your Honor.

THE COURT: All right, thank you, gentlemen.

(Recess)

(11:35 a.m., in the robing room)

THE COURT: The note says "What is the definition of the term, 'material matters', closed quote, used in Count 10 through 13 of the indictment?"

I previously charged at it which is on the record, that materiality was an issue for the jury to decide. And I believe that charge was in error.

The charge that I originally gave the jurors was taken directly from—when I say directly, with my paraphrasing from Devitt & Blackmar, pattern jury instructions.

Under Chapter 36 entitled, "Preparation of False Returns." The elements of the offense, reading from 36.04, "Essential elements of offense, three essential elements are required to be proved in order to establish the offense charged in the indictment. First, that the act or acts of aiding or assisting in or procuring or counselling or advising the preparation or presentation of false or fraudulent income tax return as charged.

"Second, doing such act or acts with knowledge that the income tax return in question was false or fraudulent, as charged.

"And third, doing such act or acts wilfully."

And that is in accordance with the way I originally charged it to the jury.

I have only found one case on the question of materiality and it holds that materiality is a question for the court.

MR. AKERMAN: That's consistent with the charge that we—

THE COURT: Jet let me make my record, then I'm going to have to do something about this.

Quoting on page 86 of the pocket part of Devitt & Blackmar, under paragraph 3605, entitled "Wilfully—To Court." And the second paragraph: "Materiality is a question of law for the Court, just as in perjury cases. The jury must, of course, decide that the return has been wilfully prepared."

* * *

THE COURT: Well, they didn't phrase it as sucinctly as they did in their last note. And I do believe that each note they sent, we instructed them in answer to the note that it would be terribly improper for us to hypothesize as to what they may mean, because that may be telling them something they are not asking. But when they put the question directly that was bothering them, we answered. And I think we have done that with all of our notes. And I will just wait for a while longer and see how they're doing, and then we will call them out and find out.

All right, we are in recess.

MR. KASANOF: Thank you very much, your Honor.

THE COURT: Sure.

(Recess pending verdict)

THE COURT: This note is Court's Exhibit AG.

(Court's Exhibit AG was marked.)

(The jurors entered the courtroom at 4:00 p.m.)

THE COURT: All right, Ms. Weintzer, will you please rise?

Am I pronouncing your name correctly?

THE FORELADY: Weintzer.

THE COURT: All right, I have a note—two notes, really. The first one: "The jury has reached a verdict on all counts."

Is that correct?

THE FORELADY: Yes.

THE COURT: The second note: "The jury requests limousine transportation home tonight."

That is being arranged for you right now.

The Forelady: Thank you.

THE COURT: All right, Madam Foreperson, how says the jury as to each count that was submitted to it for deliberation? If you will start with the first count and read your verdict, go to the second on through the counts.

THE FORELADY: Okay.

Count one, guilty.

Count two, guilty.

Count three, guilty.

Count four, guilty.

Count five, not guilty.

Count six, guilty.

Count seven, guilty.

Count eight, guilty.

Count nine, not guilty.

Count ten, not guilty.

Count eleven, not guilty.

Count twelve, not guilty.

Count thirteen, not guilty.

THE COURT: Counsel, do you wish to have the jury polled?

MR. KASANOF: Yes, your Honor.

THE COURT: All right.

(The jury was polled and each juror answered in the affirmative as to the verdict)

THE COURT: So say you all. All right.

Now, may I have the verdict sheet, please?

And jurors, would you retire to the juryroom for a little while—it won't be too long—while I speak to counsel?

Counsel, would you come in chambers.

(In the robing room)

(There was a discussion off the record)

MR. KASANOF: In regard to the forfeiture, your Honor, the forfeiture provision requires a jury's verdict and relates to situations in which the ownership interests are inchoate, where somebody is said to have an interest in a bar or a boat. We are satisfied to have any further fact finding done by your Honor.

And if a hearing is required, we will do it before your Honor. And we are satisfied that the question of forfeiture, as Mr. Akerman says, presents many novel issues of law. But we do not wish to have any of the issues either of law or fact determined by the jury. And I have confirmed my authority to make this waiver by speaking with the defendant just before we came in, and telling him that we were going to do that.

Excerpt from Post-Trial Hearing, February 23, 1983

THE COURT: Let me ask Mr. Akerman, if I may, Mr. Kasanof.

Mr. Akerman, would you say that I had rather parsed it correctly or incorrectly?

MR. AKERMAN: As to the issue that is presented before the Court?

THE COURT: Yes.

MR. AKERMAN: Yes, I think you did.

THE COURT: Now, let's say it again to make sure we are all saying the same thing, that Mr. Weiss falsified corporate records and received for those falsified records, or based upon those falsified records, cash and stock which went back to Warner Corporation—

MR. AKERMAN: No, that was not our theory—

THE COURT: Cash fund—

MR. AKERMAN:—that the money went to the corporate benefit—

THE COURT: I beg your pardon?

MR. AKERMAN: It was never our theory that the money was for the corporation's benefit.

THE COURT: There was no proof of what the money was for.

MR. AKERMAN: That is right.

THE COURT: All right, so with the presumption of innocence one cannot assume that it was not for the corporate benefit, can we?

MR. AKERMAN: Well, it's just like Margiotta because of the concealment—

THE COURT: We are going to get to Margiotta, and we are going to get to Barta and we are going to get to a lot of other things, but we just want to get the facts straight.

There was a corporate fund created, right?

MR. AKERMAN: Well, there was a fund created. We don't know for whose benefit it was.

THE COURT: Absent the proof in a criminal case, we cannot assume it was—

MR. AKERMAN: Well, no. The proof here, your Honor, would be as to the falsified records, that there would be no reason to falsify the records unless the cash fund—if the cash fund were for the benefit of the stockholders there would be no reason to falsify the records—

THE COURT: No, wait, Mr. Akerman. We are not talking about the stockholders; we are talking about the corporation, Warner Corporation, and maybe we just have to spell out further—

MR. AKERMAN: Oh, I see what you are saying. You are talking about the management as opposed to the stockholders?

THE COURT: Absolutely, absolutely.

MR. AKERMAN: All right, then we are on the same wavelength.

THE COURT: That the false records in return for money and stock, the money going into the cash fund, according to the Government's theory, of the corporation, right?

MR. AKERMAN: Of the management, right.

THE COURT: Of the corporation.

MR. AKERMAN: Right. Fine.

THE COURT: The bribe that you allege is specifically what?

MR. AKERMAN: First in late May of 1973—

THE COURT: No, just generally. I said specifically, but I mean which part of this chain is the bribe you're alleging?

MR. AKERMAN: Well, the two stock transactions, first in late May of '73—

THE COURT: The receipt of moneys in addition to the stock?

MR. AKERMAN: Well, where Mr. Weiss agreed to arrange for Warner to buy 20,000 shares in the public offering in return for a hundred thousand in cash—

THE COURT: That's what I mean.

MR. AKERMAN: Right.

THE COURT: Now, Mr. Kasanof is saying that if the premise is that the cash fund was a fund that was authorized by the corporate management and the money received for the stock transaction, or received along with the stock transaction went into the fund authorized by the corporate management, how, then, he is asking, can that be considered a bribe?

MR. AKERMAN: Well, it's a bribe, simple. Mr. Horwitz delivered fifty thousand in cash to the management who in turn—that was an inducement for them to go out and buy stock in the theater.

THE COURT: He delivered fifth thousand to management?

Hearing Regarding Jury's Use of Extra-Record Evidence
May 25, 1983

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

81 Cr. 636 (MJL)

May 25, 1983—4:20 p.m.

UNITED STATES OF AMERICA,

—against—

SOLOMON WEISS,

Defendant.

APPEARANCES:

JOHN S. MARTIN, JR., ESQ.,
United States Attorney for the
Southern District of New York,
By: NATHANIEL H. AKERMAN, ESQ.,
Assistant United States Attorney

ROBERT KASANOF, ESQ.,
BART SCHWARTZ, ESQ.,
MARY SHANNON, ESQ.,
Attorneys for Defendant

Also Present:
JOAN ALEXANDER

(Robing room)

THE COURT: For the record, we're having a conference now as to what are the appropriate questions to be presented to the jurors and I am giving an opinion off the top of my head. I hope it is accurate.

The last time we talked about this I think I made a ruling and based upon the contents of that note, particularly the wording that was below the line and the statement that was placed upon the record by Mr. Silverman and taking those in conjunction, it was a very circumstantially strong showing that a document of some kind was in that room.

Now, if the only thing we're going to inquire into at this time is "Was there a document in the room?" that won't tell us very much about the—or give me very much of a predicate upon which to base an opinion whether there was prejudice or not.

MR. KASANOF: If your Honor please, we have prepared these questions which we think are probing without asking for juror conversation.

THE COURT: Suppose you let me have a minute to read them because I haven't read them before.

MR. KASANOF: And I think Mr. Akerman would agree that all these questions are appropiate. Whether other questions are needed is a different matter.

MR. AKERMAN: I think that's right. All except 24, which I think is basically a fishing queston which I think maybe we would get to—

THE COURT: Kathy, did we get the notes?

(Discussion off the record)

THE COURT: Kathy, I think you ought state that for the record.

THE CLERK: I was able to contact 10 of the 12 deliberating jurors. One John Foote, F-o-o-t-e, his mother advised me he's on vacation, so did his employer since I called his employer. He's due back to work on Tuesday but will be back at home on Monday, May 30.

Mr. Leo Silverstein cannot be reached at all. He is retired and there was absolutely no answer at his home any time I tried yesterday morning and at 9:05 I sent a telegram which read that it was urgent that he call Judge Lowe's chambers along with another juror I could not reach.

We heard from one juror but not from Mr. Silverstein. He's obviously away from home.

MR. KASANOF: Why don't we defer that until the end of today and see where we sit with that.

THE COURT: When I look at some of these questions, question 7, what is the reference to xerox? Well, certainly the jurors are going to tell us what they believe that reference is.

Who brought in the xerox? Well, that's factual.

How did it come about that he brought the xerox into the room?

Well, certainly, if the juror is going to tell us how it happened, they are going to tell us what the circumstances were of it coming in.

Well, 10 is a factual one. Did you see the xerox? Did other jurors see it? What was the subject matter of the xerox? What is the reference to underlying sentences? Who underlined. What was the subject matter?

You see it is hard to divorce the factual matters from what the juror recollects concerning the exhibit.

MR. KASANOF: I agree with you, your Honor. Our position is that no question should be put to the juror which in the first instance calls for conversation because that will intrude on the jurors' deliberations.

THE COURT: Mr. Kasanof, take this one. How did it come about that he brought the xerox into the jury room?

Now, you tell me how a person is going to answer that question and not tell us what the conversation was if there was a conversation that occasioned it. I'm not a magician now.

MR. KASANOF: Nor I, your Honor. And it is possible that there is some incidental inquiry but what I am saying is that I and Mr. Akerman, I think it may be clear if we now ask our learned adversary to tell us what questions besides these he would like your Honor to ask and I think that will demonstrate

the difference that stands between us. Because he really wants to probe into whether or not the juror gives the kind of answer—suppose a juror answers, did anyone read this question three aloud to other jurors before it was sent out to me. Yes, Mister so and so did or Miss so and so did, or were all of the jurors present? Yes. Who wrote it out?

Mr. Akerman may want to ask who said what to whom and when it was being written out. I think that there is a great danger of intruding into juror deliberation.

I wonder if Mr. Akerman would tell us beside the question put, and I believe there are some endeavors not to get that answer, I don't think Mr. Akerman wants to make the endeavor, he wants to start asking for interior juror conversations and we, with great respect, think that's what is exactly forbidden by 606(b).

MR. AKERMAN: All I'm proposing, judge, and I can't come up with a list of questions. Even these depend on what the first answer is.

THE COURT: This is like writing out cross-examination.

MR. AKERMAN: Exactly. And I really just leave it to your Honor's discretion as to what you said the other day which I thought was totally appropriate. In certain instances in determining prejudice it would be necessary to know what was said and I leave it to your Honor—

THE COURT: Okay. I didn't mean to cut you off.

Mr. Kasanof, let's try the first one, let's see how it goes and if I deviate you will make an objection on the record if you think it is improper, that is, my question, my further question.

MR. KASANOF: I would like to do that but I would like not to interrupt.

THE COURT: After we finish the questioning I will do the best I can to excise a question if I agree with you as to what is inappropriate.

MR. AKERMAN: Or either side.

THE COURT: I'm just speaking to Mr. Kasanof because he's the one with the objecton.

MR. KASANOF: I'm the proponent of the narrower view.

THE COURT: I agree with you. I don't want to know what effect that had on a juror's mind but it is hard for me to see how you can intelligently elicit some of these questions and not stray a little bit from this script but let's see how far we can go.

Do we all agree we don't want to put the jurors under oath?

MR. AKERMAN: We talked about this since Mr. Kasanof and I anticipated this—

THE COURT: Let me tell you something. I don't remember the jurors name but one of them was absolutely adament about the fact that she had served her time and she did not want to come here and on and on and on, and I said, well, I don't think you have any choice and she said she's upset.

MR. KASANOF: I take it that the government now will concede, whether or not the oath is administered, this record is just exactly equivalent to a record taken under oath and the government will not now or later argue that the record is in any way deficient because a formal new oath wasn't administered?

THE COURT: It is continuing.

MR. AKERMAN: I think that's right.

MR. KASANOF: And the government agrees it will not take a contrary position and object to the failure to administer a new oath?

MR. AKERMAN: I would only ask that the court remind them that their oath as jurors continues.

THE COURT: You may get some stiff backs and I am telling you you might. Some of these jurors are here reluctantly.

MR. AKERMAN: In that regard, I would ask your Honor to give some preamble as to why they are here and the questioning relates to a very, very narrow aspect of the deliberations.

THE COURT: Then I would get into perorations and I might say something that's inappropriate.

I am going to tell them that there was a note received during the course of the trial, show them the note, let each of them read it first and tell them I want to ask them some questions about it. I will go right down the line.

MR. AKERMAN: The only other thing I would ask to be added to this, that after the note, I would also ask your Honor

to insert in there that you—this following language, basically, "You may recall when I received this note I said" and then to include—

THE COURT: If you give me the transcript, I will read it directly from the transcript. I just don't want to do anything extemporaneously.

MR. AKERMAN: Right.

THE COURT: Do you have objection to that?

MR. KASANOF: I don't know what it is.

THE COURT: As far as the inquiry that is above the line, "The jurors must decide the case based upon the evidence"—no, I don't think we should do that because that might trigger their response.

I think it is the last part that I should read to them, "As far as what is under the line on the paper, I don't understand what that means." That is what I should put to them.

MR. AKERMAN: I think the proper context should be both because what we're talking about here is prejudice. It may be that the jurors what they did, if there was such an accounting excerpt in there on the xerox page, it might well be that what they did was, let's ask the judge what this is all about, what this CPA accounting thing is and how far we should consider it.

It would seem that all the facts should be brought back—

THE COURT: Then you are going into the jurors' state of mind and that's the very thing that—

MR. KASANOF: 606(b).

THE COURT: The only issue that was up in the air at the time of the note was what was below the line which we didn't understand. All right.

Isn't that true?

MR. AKERMAN: That's right.

Well, perhaps your Honor maybe you could say that after you received the note that you made a statement and leave it at that.

THE COURT: Come on, Mr. Akerman. If it is all for you, you want it, and if it is not all for you, then you say forget it. That's not right.

MR. AKERMAN: All I'm concerned about is leading them to believe that's all what was said. To say, "Among the other things I said, I said the following", but if they are led to believe that's what was said in response to that note—

THE COURT: We're only concerned with that portion of the note that was below the line. We're not concerned with what was above the line.

MR. AKERMAN: I understand what you are saying, judge.

All I am saying is that I don't want them to think or to have the juror led to believe that that was the only thing your Honor said when their recollecton might vary. If they were told, "Among the things I said I said, I said the following or included in what I said I said the following".

MR. KASANOF: It just invites something more. I think the questioning is about the note. We are going to have the note—

THE COURT: Let me put on the record what the response was to the note under the line at 1999. "As far as what is under the line on the paper, I don't understand what it means. So I will return the note to the jury and if you will write a further note if you desire an explanation of what it means 'Underline xerox sentences', et cetera. We cannot figure out what that means."

And that will give the jurors a pretty good idea that we're now trying to figure out what it means without any editorializing one way or the other.

Fair? I think it is fair. I will tell them that their oath continues.

MR. KASANOF: Where do you wish to do this physically?

THE COURT: We will do it in the jury room.

Does everyone agree that's the exhibit we're discussing?

MR. KASANOF: Yes.

MR. AKERMAN: Yes.

THE COURT: If you will give me half a minute to familiarize myself with the questions.

(Pause).

THE COURT: Instead of reading it to them, I am just going to show them the exhibit which is Exhibit Y.

MR. KASANOF: Do you want the books, judge? We have copies.

THE COURT: If necessary, I will ask for them.

(Pause)

MR. KASANOF: Subject to your Honor's approval we would—

THE COURT: The answer is yes.

(Jury room)

THE CLERK: The first juror is Vivien Winczer.

(Juror No. 1, Vivien Winzcer, entered the jury room)

Examination by the Court:

Q. The first thing I want you to do is put your name on the record for us.

A. Vivien Winzcer, W-i-n-z-c-e-r.

Q. Your oath as a juror is continuing. Do you remember the oath you had?

A. Yes.

Q. I want to ask you some questions.

On Friday, November 26, that was the day before the jury's verdict was rendered, this note—and I show you Exhibit Y—was sent to me. I want you to read it to yourself.

(Pause)

Q. In commenting upon this note, particularly the part below the line, I am reading from the transcript, I said "As far as what is under the line"—this exhibit. "As far as what is under the line on the paper, I don't understand what it means. So I will return the note to the jury and if you will write a further note if you desire an explanation of what it means "Underline xerox sentences' et cetera. We cannot figure out what that means."

Now, I am going to ask you a series of questions.

Have you ever seen Exhibit Y before, that is, the note?

A. Well, I signed it so I must have seen it.

Q. Did anyone read this note aloud to the other jurors before it was sent to me?

A. Yes.

Q. Were all of the jurors present at the time the question was read?

A. As far as I remember, yes.

Q. And who wrote the note?

A. Well, I think it was Mr. Sutherland.

Q. Did he write above the line or below the line or both?

A. Well—

Q. As far as you can tell?

Q. I would imagine he did the whole thing. It is in the same ink.

Q. Now, could you tell us to the best of your recollection what is the reference to xerox?

A. I can't remember.

Q. All right.

Do you recall if there was any xeroxed material in the jury room at the time?

A. It might have been in reference to an exhibit.

Q. Do you see the names Miegs and Miegs?

A. Yes.

Q. What was that in reference to?

A. I don't remember.

Q. Do you recall if there were any books in the jury room?

A. In the jury—no, I don't remember.

Q. Other than the exhibits that were sent in, do you have any recollection of any xeroxed material at all concerning what is below the line in the jury room?

A. Well, there was a lot of material. I don't remember what was xeroxed or what wasn't.

Q. Do you remember any statements made in the jury room about the subject matter that's below the line?

A. No.

Q. You see, if I tell you that—

A. I remember you reading the note, but—

Q. Do you remember me saying I don't understand what this means, what is below the line?

A. It might have been to a reference that he knew about.

Q. Who is he?

A. Mr. Sutherland. You know, just from his own personal knowledge, as far as definitions of professions.

Q. You see the nature of our inquiry is to determine what this means or what the jurors knew at the time that note was sent.

A. Maybe he submitted something else with this.

Q. And I know this comes to you very fresh, but when you search your memory, do you have any recollection of what, if anything, it was?

A. No, I don't know what that Miegs and Miegs is.

Q. If I tell you that Miegs and Miegs are authors of an accounting text book, would that have any ability to refresh your recollection one way or another?

A. I really don't remember.

Q. All right, thank you so much.

Now, can you get home without any difficulty?

A. Yes, no problem.

THE COURT: Would you wait outside the door for just a moment and then I will let you go.

(Juror No. 1 was excused from the jury room)

THE COURT: That's what I mean about writing cross-examination questions out.

(Pause)

MR. KASANOF: Our request would be that each of the Miegs and Miegs accounting volumes be put on the table and the juror be asked whether looking at them refreshes her recollection in any way.

THE COURT: Well, I think they will be honest if they saw it, yes. But I kind of think the import of this note was that it was xeroxed and not the volumes.

MR. KASANOF: I think that's right, your Honor. But there is, you recall, some second hand information that Mr. Silverman has reported to us about the possibility that there was an initial effort to bring the book itself in.

MR. AKERMAN: But Mr. Silverman's information contradicts that after he checked on it.

MR. KASANOF: That is not so. I agree with you that this juror seems to have a total failure of recollection but I wonder by simply showing the book does this in any way refresh her recollection.

THE COURT: Mr. Akerman?

MR. AKERMAN: I have—

THE COURT: Any objection to that?

MR. AKERMAN: I have none. We don't need both books.

MR. KASANOF: Yes, because we don't know which one was used.

THE COURT: Bring the juror back in.

(Juror No. 1, Vivien Winzcer, returned to the jury room)

Q. A couple more things. I want to show you two volumes. During your deliberations, did you ever see any one of these books? You can take them and look at them.

A. I really don't think so.

Q. That's the best recollection you have?

A. Yes.

Q. Now, you understand this is a very important thing that we are discussing and I ask you not to discuss what went on in this room either with any jurors, with your family or anybody else?

A. Yes.

Q. Now, as far as going home is concerned, you are all right?

A. Yes.

THE COURT: Anything, gentlemen, that you can think of?

Thanks ever so much. I truly appreciate it.

(Juror No. 1, Vivien Winczer, was excused from the jury room)

MR. AKERMAN: Judge, could you kind of put the books away so that you can use them on cross to surprise them.

THE COURT: Do you want Mr. Sutherland to come in?

Because, obviously, if, in fact, he says it is personal knowledge it might end the matter.

You want to go down the list of jurors?

MR. KASANOF: I think to bring him in now would too much of a focus on him.

THE COURT: Who is juror number two?

THE CLERK: The list I have is in alphabetical order. I don't know who juror number two is. I went to look for my minutes and for some reason they were misfiled.

MR. KASANOF: What would happen if you simply asked or juror number two?

MR. AKERMAN: I would like to hand up the Moten case which talks about the less intrusive inquiry into the jury where the Court of Appeals approved of a couple of jurors being questioned.

THE COURT: I read the case.

MR. AKERMAN: If Mr. Sutherland was brought in maybe —

THE COURT: Let's do it this way.

THE CLERK: Mr. Tabon. Walter Tabon.

(Juror No. 2, Walter Tabon, entered the jury room)

Examination by the court:

Q. Mr. Tabon, do you remember the oath you took as a juror?

A. Yes.

Q. That still continues.

A. Yes, judge.

Q. I show you Exhibit Y that was sent to me during the course of your deliberations. It was November 26. That was the day before the verdict was rendered and if you would take this and read it to yourself, I want to ask you some questions about it.

(Pause.)

Q. What I am particularly directing the questions toward, Mr. Tabon, is this information that's below the line.

When the note was sent to me, after commenting upon what was above the line, and I'm reading from the transcript of the record, I said to the jurors: "As far as what is under the line on the paper, I don't understand what it means. So I will return the note to the jury and if you will write a further note if you desire an explanation of what it means 'Underlined xeroxed sentences' et cetera. We cannot figure out what that means."

Now, have you ever seen this papers before?

Did you see it before it was sent out to the court?

A. I may have but I don't recall at this moment.

Q. Do you know if the note was read to the jurors before it was sent out?

A. I believe it was.

Q. Do you have any recollection as to who wrote that note?

A. No, I don't.

Q. Do you or could you tell us if you remember what the reference to xerox means, the word "xerox" there?

What does that mean to you?

A. Would that be a copy of the original?

Q. The original of what?

A. Xerox? I'd rather say I'm not familiar.

Q. I don't want you to say what you'd rather say.

This is an important issue we're dealing with and we want you to search your memory and, to the best of your memory, tell us whatever it is you are saying to us is.

As you see it is not published. I don't want you to discuss this with anyone, either family, other jurors, any outside persons what you are saying here to us. This record is sealed and what we just want is your best memory of what this matter under that line means.

Now, you read it again to yourself and see if you can remember it. I don't want you to be frightened or upset by this inquiry.

A. Using my best recollection I recall now, I believe I recall, actually seeing this statement or hearing or reading this statement before.

Q. By statement, you mean the note?

A. Yes. Yes, I would say I was familiar with it at the time.

Q. Do you have any recollection of what prompted this writing that is below the line referring to the xerox?

A. Maybe at the time of the trial I did but now it is hazy.

Q. Now, if I tell you that Miegs and Miegs is the name of a text book in accounting, would that refresh your recollection at all?

A. Yes.

Q. What do you recall concerning that?

A. I recall—

Q. Would you keep your voice up so everyone can hear what you are saying?

A. Yes.

I recall one of the jurors was familiar with CPA, giving a description on accounting, of what you have here in front of me to the rest of the jurors.

Q. Do you recall what he said, he or she whoever the juror was?

A. It was a he and he was outlining some of what you had enlightened me to just now.

Q. The Miegs and Miegs book?

A. Yes.

Q. Now, was the text book in th jury room or was there a xerox or was he doing it from memory or what?

A. I think he had some minutes, if I may use that term, and I think was an accurate accounting that he was giving us. He did some research.

Q. Now, when you say minutes, was it an exhibit that had been sent into the jury room or was it something that he had?

A. I think so.

Q. Had you seen or did you see what it was he was giving you the account from—strike that.

When you say giving you the account from, I assume you mean he was reading something and telling you what it meant?

A. Yes. He was enlightening us to some of what I see here in reference to what a CPA is and he went down the line with a more accurate definition.

Q. Where did he get the more accurate definition?

A. Well, he took it upon himeself to get it to help us to understand better what a CPA accountant was about.

Q. And how did he do that?

A. I just would have to say from my recollection I think he did some research on his own, he dug it up, so to speak.

Q. Do you have any recollection of seeing textbooks, books in the jury room?

Let me show you them.

These are two text books on accounting. You see the name Miegs and Miegs. Did you see either of these in the jury room?

A. To be honest, I can't say I did at this time.

Q. So that I understand you, do you have a recollection of this juror reading from something when he was explaining it to you?

A. Yes. Even this name seems familiar.

Q. Which name, sir?

A. Charles Sutherland.

Q. Yes, that was juror number three.

A. Yes.

If I remember correctly and I'm trying very hard, I believe he was the one that I was thinking of that enlightened us to CPA more so than we knew about.

Q. Now, after the note was read in court and I made the comment that I made, announced that the jurors should go back into the jury room, was there any further discussion about what juror number three was saying?

A. Not to my knowledge.

Q. Now, I have told you I don't want you to discuss this with anybody?

A. I won't

Q. And that's family, friends or anybody else.

A. I understand.

Q. Now, if you would be good enough just to wait outside for a minute and let me see if I have overlooked something and we will say thank you very much for being cooperative for coming in.

(Juror excused)

THE COURT: Any further questions of this juror?

MR. KASANOF: Can we have just a moment to confer?

(Pause)

MR. KASANOF: Judge, we would like to request that this juror be asked to wait for a few minutes and that Mr. Sutherland, I believe is next, he should be very illuminating and then after Mr. Sutherland, there may be one or two questions.

THE COURT: Ask Mr. Tabon to sit inside my robing room.

All right, bring in Mr. Sutherland.

(Juror No. 3, Charles A. Sutherland entered the jury room)

MR. SUTHERLAND: Oh gee, the old team.

Examination by the Court:

Q. How have you been?

A. Fine.

Q. The oath that was administered to the jurors when this case first started is still in effect. All right. Do you know what I mean?

A. Okay, all right.

Q. On Friday, the 26th of November, that was the day before the verdict was rendered, the jurors sent this note which is the Exhibit Y. Read that to yourself, please.

(Pause.)

Q. Now, when that note came into the court concerning that matter below the line I said this to the jurors, reading from the transcript of the case. "As far as what is the line on the paper, I don't know what that means. So I will return that note to the jury and if you will write a further note if you desire an explanation of what it means, 'Underline xerox sentences' et cetera. We cannot figure out what that means."

So what we're about today is to try to figure out what that means now and I have some questions I want to ask you.

Have you ever seen that note before?

A. Sure. I suppose this is my handwriting.

Q. That's the next question I want to ask you. Which part of it is your handwriting, what's below the line, the whole note or what?

A. I judge it all is.

Q. The entire note, above and below?

A. Yes.

Q. Now, was that note read aloud to all of the jurors before it was sent outside to the court?

A. I would suppose so. I think we probably had some discussion about how we wanted to phrase it, arguments like that.

Q. Were all the jurors present at that time?

A. Yes.

Q. Now, could you tell us what that "Re: Underline (xerox) sentences Miegs an Miegs" mean? In other words, what is that information?

Let me read it directly into the record.

"Re: Underlined (xerox) sentences Miegs and Miegs".

What does that mean, Mr. Sutherland?

A. When I came in that morning I brought a book with me on bookkeeping. It is a basic text on bookkeeping and I had a xeroxed page, I think I put it probably in the book and I think I left it outside the door there and when we came in I knew what it said and I asked the guy that delivered this thing to you—

Q. That would be the marshal?

A. I don't remember, somebody. To give you the book and the xerox so you could see what I was talking about. And I think probably he didn't.

Q. Because I don't know what it means.

Now, was the book or the xerox ever brought into th jury room?

A. No.

Q. Was it shown by you to any of the other jurors?

A. Not—no, I don't think so.

THE COURT: Kathy, may I have those two books you have there.

Q. Were either of these the books that you have reference to? They are both—

A. I'm not an accounting student and I never used the books.

Q. Just take your time.

A. These may be a different edition of it. This is a different edition of the same—all right. I think this was from an introductory course, probably whichever one of these is used as the introductory text at Pace. I don't think that it was this. I think it had a red cover, but you know, I'm sure the text is not different. You just look up—

Q. All right. Do you recall how you used the information in the jury room that you got from that book?

A. I reiterated that my reading from the books was that an accountant is—has certain kinds of training and a bookkeeper has certain kind of training. I don't remember just what I said, but my wife is a bookkeeper. She's a bookkeeper. She does what she's told, she adds up the numbers, that's it. When you have a CPA, your trained different. Okay.

I'm a trained biochemist. I'm not a technician. I don't just put stuff in test tubes. I tell people what to put in the test tubes. And the difference between a CPA and a bookkeeper is about the same kind of difference and I felt that was important to people to understand that because we're trying to decide what Mr. Weiss knows and what it is that we can reasonably expect him to know and what you can reasonably expect of him is different for a CPA than it is for a bookkeeper.

Q. Now, did that knowledge of the difference come from your reading the Miegs and Miegs book?

A. Yes. I'm not an accountant, so I don't—

Q. You're a biochemist which is foreign to me.

A. I can appreciate the level of somebody's training. I feel like people that come in to serve on a jury that have no background of any kind of what the significance is of something are at a terrible disadvantage. They don't know. People can tell them anything and they can't sort it out.

Q. Now, Mr. Sutherland, let me ask you to do us one more favor. If you would just wait outside the door here and let me

see if there are any questions that counsel want to put to you. I appreciate your coming in. I really do.

A. Sure.

(Juror No. 3 was excused).

MR. AKERMAN: Your Honor, I would ask him what it was that prompted the note and what was said about it after your Honor's instruction and whether anything else was said about this matter after your Honor gave the instruction.

THE COURT: What prompted the note?

MR. AKERMAN: Right.

THE COURT: And what was said after the instruction?

MR. AKERMAN: Right.

Was anything more said about this matter after this instruction, as you had asked the other juror.

THE COURT: Well, when you say what prompted the note, you mean you want to know what was the discussion before the note and was there any discussion after the note?

MR. AKERMAN: Right.

THE COURT: Mr. Kasanof?

MR. KASNOF: Certainly, after the note that can only be an inquiry about juror deliberation which we respectfully believe must be barred by 606(b).

I would like just a moment.

(Pause)

MR. KASANOF: I would like your Honor to ask him, basically, whether he was doing—and I think the previous witness referred to—research. Whether he had told the jurors he had done research and I would like your Honor to show him—

THE COURT: Well, he said—didn't he say he had researched it?

(Pause)

MR. KASANOF: I ask your Honor to show Mr. Sutherland page six, about three-quarters of the way

down with the red heading, "public accounting", and your Honor will observe the public accountants are independent professionals comparable to attorneys or physicians, and that that precisely dovetails into the earlier part of the note which asks about the difference between physicians and legal aids—lawyers and legal aids.

THE COURT: Query. Didn't he say in essence that much? That his wife is a bookkeeper and the difference between a CPA and a bookkeeper is what he explained to the jury. Do you want the specific question? Mr. Akerman, I turn to you and ask you what is your view?

MR. AKERMAN: I have no objection. It doesn't seem to add anything.

THE COURT: I agree with Mr. Akerman. It doesn't add one thing.

MR. KASANOF: Your Honor, if it does not add, then you are right.

THE COURT: Is there anything you want to ask Mr. Sutherland and the other nice gentleman, Mr. Tabon?

MR. AKERMAN: I still have the other questions.

THE COURT: Yes, I know. As to what occasioned the note.

MR. AKERMAN: And then what happened after your Honor's instruction? Was there any more discussion about this after your Honor's discussion?

MR. KASANOF: Judge, because we do not have a transcript, it is our understanding that Mr. Sutherland has said that he had communicated the substance of the difference between accountants and bookkeepers to the other jurors and he did so on the basis of having read those books.

THE COURT: He didn't say which book. A book.

MR. KASANOF: A book by those authors, a red covered one used at Pace University.

THE COURT: So I will pose Mr. Akerman's questions. What occasioned the writing of the note and was there any discussion among the jurors after they returned from the courtroom?

MR. KASANOF: With our respectful exception.
THE COURT: Yes, all right.
THE CLERK: Ready, judge?
THE COURT: Sure thing.

(Juror No. 3, Charles Sutherland, returned to the jury room)

Q. Mr. Sutherland, let me ask you this. What occasioned the writing of this note? That's a broad question, because I don't want to direct you memory anywhere, I just want your best recollection of what caused the note to be written?

A. One of the key aspects of deciding whether or not Mr. Weiss was guilty rested on the argument of whether or not one can reasonably expect him to know certain kinds of things. The understanding that Mr. Kasanof would have had us to accept was that—I guess the thrust of your argument was—Mr. Weiss, whatever, whether he was knowingly doing something wrong or not, that he was just following the kinds of things that a bookkeeper or accountant does without really having a good grasp of the significance of it. He was just given documents to sign, to disburse money to people and do other things which I have forgot specifics, but that he wasn't himself knowingly participating in something which was illegal.

And if the man was functioning as a bookkeeper then one might accept that, I suppose. But we were dealing with a guy here who is at the top of his company and he's being paid a tremendous amount of money, he's dealing with the most intricate finances with the head of the whole company, Mr. Ross, and to me what is important, to me the man is trained as a CPA and to me a CPA, as I understand—

Q. Let me cut you off, Mr. Sutherland. I am not asking for the operation of your mind. I want to know what was the discussion with the jurors that occasioned this?

A. All right. When we discussed whether or not we can expect Mr. Weiss to know, to understand what he was doing, you have to discuss with the people around the bench whether
—

Q. The table you mean?

A. —whether or not this man has the training, has the expertise to understand what he's doing. Now, that's this. In order for these people to know whether or not he should understand, they have to know something about the significance of his training. You know, is it the training of somebody working in a six-man operation where they just keep track of a few dollars coming in or going out or is this man trained for years where his business is to understand the significance of the numbers, not to just add them up but to know what it means?

Q. Now, is that why you did what you called the research or looking at the red book you told us about?

A. Sure. Because I wanted to know for myself what this guy is supposed to know.

Q. Now, did you convey that—

A. As it happens, it is easy for me to do it because my wife has the books.

Q. And did you convey to the jurors what your understanding was?

A. Sure.

Q. Now, the next question I want to ask you. After the note was read in the courtroom and I said what I said and the jurors came back, was there any further discussion?

A. I think we decided to drop it.

Q. Could you tell me how long the matter was discussed before the note was brought out to the courtroom?

A. What can I say?

Q. As a scientist you didn't keep a stop watch.

A. We spent some time, a little time.

Q. All right, Mr. Sutherland.

Did I tell you I don't want you to discuss this with any of the other jurors?

A. Yes.

Q. Or with anybody else outside. Has anyone contacted you about this?

A. About this?

Q. Yes.

A. The connection between Mr. Brill's phone call and this whole business hasn't come clear to me yet, okay.

Does that answer your question?

Q. Yes, it does. Thank you very much.

A. I have been unable to find his story.

Q. None of us—or at least I haven't seen it.

A. The law libraries don't care enough about his newspaper to carry it in their files.

Q. Thank you so much, Mr. Sutherland.

THE CLERK: Mr. Sutherland, do you need anything in writing to indicate that you were called here today.

MR. SUTHERLAND: They believe me.

THE COURT: They better.

(Juror No. 3, Charles Sutherland, was excused from the jury room)

THE COURT: Does anyone want to ask any further questions of Mr. Tabon?

MR. AKERMAN: No.

MR. KASANOF: No.

THE COURT: Just tell him to stick his head in the door so I can give him the courtesy of thanking him.

(Pause)

THE COURT: Thank you so much, Mr. Tabon. Will you have any difficulty in getting home?

MR. TABON: No, ma'am.

(Juror No. 2, Mr. Tabon, was excused from the jury room)

THE COURT: Next juror.

MR. KASANOF: Would you hold for a second?

(Pause)

MR. SCHWARTZ: We were talking about perhaps limiting the questioning or focusing a little bit more on what Mr. Sutherland has said he told the other jurors. If you would ask them if they remember what he said, what he referred to and still ask the question if there was an xerox copy in the room.

THE COURT: I am going to go right down this page with every juror just like we did before of the questions that are relevant and from their answers, if they are irrelevant, I am not going to say, Mr. Green, what did you discuss.

(Juror No. 5, Peter Rinaldo, entered the jury room)

THE COURT: For the record, would you give your name?

MR. RINALDO: Peter Rinaldo.

Examination by the Court:

Q. Mr. Rinaldo, the oath you took as a juror still applies now.

A. Yes.

Q. On Friday, November 26, the day before the jurors' verdict was rendered in the Weiss case, this note, which I marked as Exhibit Y, was sent to me and it came to the jurors.

Mr. Rinaldo, would you be good enough to read it to yourself.

(Pause)

A. Yes, ma'am.

Q. Have you ever seen that note before, Mr. Rinaldo?

A. Yes.

Q. Now, was this note read aloud to the jurors before it was sent into the courtroom? Let me say that's kind of—well, go ahead, you tell me.

A. I really don't remember.

Q. Do you know who wrote this note?

A. Mr. Sutherland.

Q. And could you—let me tell you what. I will read to you my response, not to the top particularly but speaking to the bottom.

"As far as what is under the line on the paper, I don't understand what it means. So I will return the note to the jury and if you will write a further note, if you desire, an explanation of what it means 'Underline xerox sentences' et cetera. We cannot figure out what that means."

Do you have any recollection at this time, Mr. Rinaldo, of what that portion under the line refers to? Take the word xerox?

A. I believe Mr. Sutherland had xeroxed a portion of a text book and underlined certain sentences which discussed the role of a CPA.

Q. And could you tell us how that was used in the jury deliberations?

A. I don't think that the text book excerpt was actually used in the jury deliberations themselves. I think he read it but we moved onto other things but I think that during the deliberations we kept returning to the fact that a certified public accountant had received a good deal of special training and was expected as a professional to be knowledgeable in his field.

Q. Now, where did that information come from?

A. I think it was from our general knowledge, really. At least that was true in my case.

Q. Did Mr. Sutherland have any contribution to that information?

A. Yes. I think he stated several times during the deliberations, that I remember, a CPA was different from a bookkeeper in the same way a chemist was different from a technician.

Q. Now, do you have any recollection of him reading anything to you and, if so, could you describe what it was?

A. I believe he read this part of the text book which he referred to in this note.

Q. Did he have the text book itself or was there a xerox of the text book, if you can recall?

A. I don't know. I really don't know.

Q. Now, after I said what I said in court when the note was read, was there any further discussion of this matter what a CPA is by the jury?

A. I don't remember. I think we interpreted your answer as saying you could give us no more information than the subject and so we moved onto something else.

Q. I want to say to you I do not want you to discuss with anyone your conversations with us in the jury room, in this room, and no matter who it is who might ask you about it, you

will tell them Judge Lowe told you that you may not. Will you have any difficulty in getting home?
A. Not at all. I'm a commuter and the trains are running all the time at this time.

THE COURT: If you would just wait outside for a few minutes to see if counsel have additional questions.

(Juror No. 5, Peter Rinaldo, was excused from the jury room)

THE COURT: Counsel, any further questions? Mr. Akerman?

MR. AKERMAN: No.

MR. KASANOF: Your Honor, with respect, I am now asserting the right that we talked about under 606(b). I do not think that your Honor may properly consider his description of his mental processes.

He tells your Honor—

THE COURT: Tell me which process you are talking about so I can have the context of your statement?

MR. KASANOF: He tells your Honor that the other juror brought in the note and read the note. Your Honor then asked—

THE COURT: You don't mean this note?

MR. KASANOF: No, the exhibit, the xerox underlined excerpt and read it. And then he begins to tell your Honor that he was not influenced or was influenced or knew or did not know about it beforehand. I think that is jury deliberation.

THE COURT: That came out before I could stop it.

MR. KASANOF: I would ask your Honor for decisional purposes—

THE COURT: I'm aware. I'm not sleeping.

MR. AKERMAN: I think we ought to wait until it is all over and we'll write briefs and all of that which will be discussed in our brief. What else can we do? There is no way you can prevent a mix of whatever.

MR. KASANOF: I know, Mr. Ackerman, that the first words that fall from your fingers are waiver. I've never seen a paper in this case that did not have some kind of—

THE COURT: All right, we have 6:30 limousines waiting for us.

THE CLERK: Shall we excuse Mr. Rinaldo?

THE COURT: If he doesn't want to take the limousine, yes.

MR. KASANOF: May we have a continuing objection so we don't turn this into something that slows us down and the government will understand we object to every inspection of the juror deliberations or juror conversations?

MR. AKERMAN: Oh, I understand Mr. Kasanof made that objection and we—

MR. KASANOF: May it be a continuing one?

THE COURT: Gentlemen, gentlemen. The question was posed to me to ask this juror without these—these jurors without objection what occasioned the note. I cannot anesthetize what they say but I will do my best in considering the record to follow the cases. That's all I can say to you.

MR. AKERMAN: I think that's all you can do, judge.

MR. KASANOF: In any event I want a concession from Mr. Akerman that we are not waiving and we are asking that—

THE COURT: You are not waiving your 606(b)?

MR. KASANOF: Right.

THE COURT: Of course. You have made it most vociferously. Or else we'll be charged double time for these limousines.

THE CLERK: Miss Gloria Francisco.

(Juror No. 6, Gloria Francisco, entered the jury room)

Examination by the Court:

Q. Miss Francisco, I personally want to tell you that the jurors oath still continues.

The day before the verdict was rendered, this note was sent to me, Exhibit Y, and I sent it to the jurors and we had a discussion.

Read it to yourself so you can focus on what we are concerned with here.

A. Yes.

Q. Have you ever seen this before?

A. I don't remember seeing it, no.

Q. Was this note read to the jurors before you came out into court when I read it aloud to you?

A. Not to my knowledge.

Q. Do you have any recollection at all about who wrote this note?

A. No, I don't.

Q. Do you know what these words "Re: Underline (xerox sentences Miegs and Miegs" mean?

A. I don't remember.

Q. Was there any discussion in the jury room that you recall concerning a xerox of Miegs and Miegs, which, I tell you now, is an accounting book? They are the authors of an accounting book. Does that refresh your recollection?

A. No.

Q. And at this time you have no memory of any discussion such as this taking place?

A. No, not of that.

Q. The matter above the line, do you have any recollection of that?

A. Vaguely, but I can't be 100 percent sure.

Q. What's your best recollection, Miss Francisco?

A. I know it is too vague. I really don't remember.

Q. Now, I want—after you leave here, I don't want you to discuss what you said with anybody with regard to the questions I have asked you. Can you do that?

A. Yes.

Q. Will you have any problem getting home?

A. No. I'll just take the subway.

Q. Thank you so much.

THE CLERK: Miss Francisco, did you need something in writing for your employer?

MS. FRANCISCO: No.

(Juror No. 6, Gloria Francisco, was excused from the jury room)

MR. KASANOF: May we have a moment, your Honor?

(Pause)

MR. KASANOF: Would your Honor think it appropriate to simply ask the direct question: Does she remember Mr. Sutherland reading something to the jurors?

THE COURT: I think that would point her memory too closely. That would direct her to—

MR. KASANOF: I think on the other hand—

THE COURT: I don't want to ask a leading question. I know my friend at the end of the table knows what a leading question is from the grand jury minutes.

MR. KASANOF: All right.

THE CLERK: Duane Wilson.

(Juror No. 7, Duane Wilson, entered the jury room)

THE COURT: How are you, Mr. Wilson. It has been a long time.

Examination by the Court:

Q. Mr. Wilson, on the 26th of November, the day before the jury returned its verdict in this case, this note which is marked Court's Exhibit Y was sent by the jury to the court. I want you to read it to yourself and then I am going to ask you some questions about it.

(Pause)

A. Yes.

Q. Mr. Wilson, did you ever see this note before it was sent out to the court?

A. No.

Q. You must answer for the court reporter?

A. No, I didn't.

Q. Was it read to the jurors before you came out to the court?

A. I think it was.

Q. Were all the jurors present at the time?

A. I can't remember.

Q. Now, directing your attention, Mr. Wilson, to what is below the line "Re: Underline (Xerox) sentences Miegs and Miegs", do you have any recollection what that referred to?

A. No, I don't.

Q. Now, if I tell you that Miegs and Miegs is an accounting text book, would that refresh your recollection at all?

Let me read to you, maybe before you answer, what I said about it when the note came out to the court.

"As far as what is under the line on the paper, I don't understand what it means. So I will return the note to the jury and if you will write a further note, if you desire, in explanation of what it means, 'Underline xeroxed sentences', et cetera. We cannot figure out what that means."

That's what I told you when I read the note out in court. And I am asking you now if you can tell us to the best of your recollection what that meant to you at the time you were in the jury room deliberating? Do you have any recollection what the word "xerox" means?

A. I know we were making—he made a reference to this text book.

Q. Who is he? The man whose name is there?

A. Yes, Mr. Sutherland.

Q. Do you recall what he said?

A. No, I don't. It has been so long.

Q. Do you have any recollection of whether a text book or a xerox of the text book was in the jury room?

A. No. I never saw a text book in the jury room.

Q. Do you know what the reference to "underlined sentences means"?

A. No, I don't.

Q. Is there anything as you sit there that comes to mind concerning what you can tell us?

A. No, I can't.

Q. Now, I don't want you to discuss any of the questions I have asked you or the answers you have given with anybody that's fellow jurors or anybody else, all right?

A. Yes.

Q. Do you have any problem getting home tonight?

A. No problem at all.

Q. Thank you ever so much.

THE CLERK: Mr. Wilson, this is for your employer.

THE COURT: Mr. Wilson, would you just wait outside for a minute and let's see if there are any more questions for me to ask. And good luck to you.

(Juror No. 7, Duane Wilson was excused from the jury room)

MR. KASANOF: Your Honor's ruling will be the same about asking did Mr. Sutherland read from a text or a xeroxed note?

THE COURT: You object to me asking him that?

MR. KASANOF: No. As with the previous juror, I would like you to ask—in the case of the previous juror, you said you felt it focused too narrow and I'm reiterating it simply.

THE COURT: Wait a minute. That was a different context than this was. Here I was reading from your list of questions.

MR. KASANOF: Yes, absolutely.

MR. AKERMAN: I thought he answered the question that he did read it or he cited a text book. And then the judge asked if he looked at it and he didn't have it with him. Whatever the record is, it is.

THE COURT: The difference was the other juror didn't know and I didn't want to focus the other juror's attention on it.

MR. KASANOF: I'm sorry, I apparently did not. Fine.

THE COURT: You see if they have no recollection, I don't want to lead them. But if they tell me they have some kind of recollection then we will explore it.

MR. SCHWARTZ: The only other thing which occurred to me is the names of these authors, the last name is the name. It is odd, the pronunciation. I pronounce it Miegs. I wonder if it might strike a chord with the juror hearing it a different way.

THE CLERK: This is Drew Schwartz.

(Juror No. 8, Drew Schwartz, entered the jury room)

Examination by the court:

Q. How have you been?

A. All right.

Q. Mr. Schwartz, the oath you took as a juror still continues.

The day before the jury verdict, which was November 26, the jurors sent me this note which we called Exhibit Y. Now, I want you to read it to yourself and then I am going to ask you some questions about it.

(Pause)

Q. Now, Mr. Schwartz, did you see this note before it was sent out to the courtroom?

A. No.

Q. Was it read to you before the jurors filed out into the courtroom.

A. I don't believe so.

Q. Now, the matter that's under the line, while you're looking at that, I am going to read to you what the record shows I said to the jurors in court after I read the note to all of the jurors. I said:

"As far as what is under the line on the paper, I don't understand what it means. So I will return the note to the jury and if you will write a further note, if you desire, in explanation of what it means"—and I am quoting now from the note—" 'Underline xerox sentences' et cetera. We cannot figure out what that means".

-And that is why we are asking you these questions.

Do you know what the reference to xerox here means?

A. Copies, I imagine, of something.

Q. Well, I'm talking in terms of what happened before the note was brought out. What caused the note to be brought out or what those references mean that are below that line?

A. I am trying to remember.

Q. I know, take your time, it is hard. Sometimes you can't remember what you did two days ago.

A. I really can't remember anything about it as far as the word xerox.

Q. How about the words "underlined" and then it has "xerox sentences"? Does that refresh your recollection at all. Mr. Sutherland's name is right here.

A. Yes, I know, I remember him.

Q. While you're thinking, let me ask you this. Either these two names, Miegs and Miegs or Miegs and Miegs (Meegis) those are the authors of an accounting text book, does that bring anything to your mind?

A. Only that it was mentioned by one of the jurors, that book. But as far as the note is concerned, I really can't recall what this under the line here is all about.

Q. Is that the best of your memory?

A. It has been six months, you know. It is hard to remember. It is very hard, but as far as I can recall, I know the note was written, but what he meant by this, I really don't recall.

Q. All right, Mr. Schwart, I don't want you to discuss with anyone the questions I have asked you and the answers you've given.

Will you have any difficulty going home or do you want to go home in a limousine?

A. Well, it is kind of—yes, I guess I would like to go home that way.

Q. All right, if you would be good enough to wait outside, Mr. Schwartz and we'll see if there are any other questions we may want to ask of you.

(Juror No. 8, Drew Schwartz, was excused from the jury room)

MR. KASONOF: No questions.

MR. AKERMAN: No questions.

THE CLERK: Nicholas Trama.

(Juror No. 9, Nicholas Trama, entered the jury room)

THE COURT: We remember you, you sat you up on the second row.

MR. TRAMA: How is every one doing? Nice to see you.

Examination by the Court:

Q. The first thing I want to tell you is that your oath as a juror continues.

A. Yes, ma'am.

Q. I know you don't remember the day but the day before the verdict was rendered, there was Exhibit Y, this note, I received it from the jurors and then we discussed it in court. I want you to read it to yourself first.

(Pause)

A. Yes, I remember that.

Q. Now, was this note read to the jurors before you came out to the courtroom?

A. You mean like every one here—

Q. Yes.

A. Oh, yes.

Q. Now, were all the jurors present at the time the note was discussed, the writing of the note?

A. As far as my recollection, yes, ma'am, because we all sort of like discussed it on what had—how to phrase the questions, you know, the best way we thought it would look better, like that.

Q. Now, I am going to read to you from the transcript of the trial what I said. You came into the courtroom and I read the note and then I had this to say about the matter that's below the line.

"As far as what is under the line on the paper I don't understand what it means. So I will return the note to the jury and if you will write a further note, if you desire an explana-

tion of what it means 'Underline xerox sentences' et cetera. We cannot figure out what that means."

So your your while you why you are here is for you to examine your recollection and tell us as best you can what that means.

A. Okay. I think what we were trying to get to is like basically, it is hard to say. It says it right here. We were trying to figure out what a CPA was compared to a bookkeeper. In other words, does a CPA, I guess, in other words, CPA just keep records of what he's told to do or is that his job plus going on his own for the company on his own but that's part of his job. He's not just told what to do but he's supposed to have the initiative, supposed to have the initiative to compel and do things on his own in the company's behalf as, let's say, a lawyer, versus a legal aid. A lawyer gets paid, I guess, and goes out and does everything. A legal aid, I guess is supposed to do the same thing but a slight difference as we all tried to put it—

Q. You mean a legal assistant not legal aid?

A. Okay, like that. Not a lawyer but let's say, like, I don't know if you are a full lawyer, I don't know anything really about that, but let's say an apprentice.

THE COURT: Would you put your name on the record.

MS. SHANNON: Mary Shannon.

A. Like an apprentice who does some legal duties but is not able to take a case because she's not a lawyer. Do you understand what I mean?

Q. Yes.

A. That's basically what we were trying to figure out, you know, basically what were the duties of a CPA. As far as I remember, that's what we were trying to get through.

Q. Now, this name here, Miegs and Miegs or Miegs and Miegs, (Meegis) that's the name of an accounting text book. Now, does that refresh your recollection as to—

A. No, I have no idea what that is. Not that I can remember.

Q. Does this have any—do you have any recollection about what "Re: Underline (xerox) sentences" means? What did that refer to?

A. I don't remember. I wasn't writing it. I didn't write it out. I don't really remember.

Basically, like I remember, we were sitting together discussing it and we would all help in sort of wording or phrasing how we should write it out. That's the best I can do. That's what we were trying to get to do.

Q. Those things below the line?

A. I can't recall why they are there or anything like that.

Q. All right. Now, I told you I don't want you—or did I tell you—

A. No. I was told on the phone.

Q. Don't discuss what I have asked you and what you have answered with anybody, that's family, or the jurors, anybody else?

A. Right. I understand.

Q. Will you have any difficulty getting home or do you want to go home in the limousine?

A. I'm fine getting home. My wife and I are going to have some dinner now.

Q. Would you wait outside to see if there are any questions I need to ask you. Nice seeing you.

A. Fine, nice seeing you, too, judge.

(Juror No. 9, Nicholas Trama, was excused from the jury room)

THE COURT: Any questions?

MR. KASANOF: We would ask your Honor the state of his recollection if anybody read from any text book or reported from any authority on the question which was under discussion.

THE COURT: Well, he said he had no recollection, he doesn't remember anything about it.

MR. KASANOF: He doesn't remember the text book by its name. He does, however, quite confirm that there was the bitterest discussion about the level of responsibility.

THE COURT: You are going to put me in an inconsistent position with my former ruling that if they don't have a memory of it, I won't target their memory. If they do have some recollection concerning what this means then I will explore it further. I think you are asking me to do that which I ruled before I wouldn't do, Mr. Kasanof.

MR. KASANOF: I am asking you to—

THE COURT: I think I will respectfully decline. You have an exception whatever that means.

Seriously, if they tell me anything that gives me an instinctive feeling that they have some memory and they are trying to reach for it, then I'll target a question. But if they say they don't know, then I really think it is just going too, too far to ask them specifically.

Who is next?

THE CLERK: Christina Carter.

(Juror No. 11, Christina Carter, entered the jury room)

Examination by the Court:

Q. How are you, Miss Carter. It has been a long time.

Miss Carter, the oath you took as a juror still continues.

On the 26th of November, the day before the verdict was rendered in this case, this note which we call Exhibit Y was sent to me by the jurors and I brought you all out and I read the note to you. I want you to read that note to yourself because we want to ask you some questions about it.

(Pause.)

Q. Now, did you see this note or did you hear it discussed or see it written before it was sent out to the court?

A. Yes, I did.

Q. Now, once you come into the courtroom, I am going to read to you from the transcript what I said about this portion that's below the line.

I said: "As far as what is under the line on that paper I don't understand what it means. So I will return the note to the jury and if you will write a further note, if you desire in explanation

of what it means 'Underline xerox sentences' et cetera. we cannot figure out what that means."

And what we're asking you at this time, Miss Carter, is if you can recall what that matter means that's underneath the line?

A. No, I cannot.

Q. You see it says "underline (xerox) sentences". Do you know what that referred to?

A. No, not particularly.

Q. Now, if I tell you that this name either Miegs and Miegs or Miegs and Miegs (Meegis) is an accounting text book, would that refresh your recollection at all?

A. I think so. One of the jurors, the one that wrote the note, I think he had a book of some kind explaining what a CPA was and maybe he had something underlined in the book itself. Maybe that's what he wanted the court to refer to.

Q. How much do you remember about the book or what he was referring to?

A. Nothing, This is just off the top of my head.

Q. I know it is six months ago. I don't expect you to remember as if it was what you had for dinner last night.

A. No.

Q. But what we would like is the best memory you have.

A. As of the book, nothing.

Q. Was there a discussion, as you say, about the book?

A. No, not in detail, nothing like that. Nothing strongly about it.

Q. What do you mean by strongly?

A. I mean in conversation or any particular item or anything.

Q. Did you see any xerox material? Do you know what a xerox is?

A. Yes. From the book?

Q. I don't know. From anywhere, concerning the matter, subject matter of that note? Or any underlined sentences?

A. No. I really don't recall seeing any xeroxing.

Q. Do you have any recollection of what the book looked like?

A. No. I never seen it.

Q. Well, how did you know that there was a book?

A. Because what he said. I mean, what was discussed from this particular person.

Q. Well, we know the person you are talking about, I assume is Mr. Sutherland?

A. Yes.

Q. Do you have a memory of what that was? What was discussed?

A. No.

Q. Now, is there anything at all you can tell us that will help us to figure out what this means?

A. No.

Q. That you can remember?

A. No.

Q. Now, don't discuss what I have asked you and what you have answered to me with anybody else. That means other jurors or anyone else. Will you do that?

A. Yes, I will.

Q. Did I ask you if you were going to get home all right or if you want to go by the limousine?

A. The limo will be fine.

THE COURT: Would you wait right outside the door and let me see if there are any more questions to ask you.

JUROR NO. 11, Christina Carter, was excused from the jury room)

(Pause)

THE COURT: Kathy informs me that Mr. Schwartz has been thinking about the questions and would like to come back in because he has a recollection he would like to share with us.

(Juror No. 8, Drew Schwartz returned to the jury room)

Examination by the Court:

Q. Yes, Mr. Schwartz?

A. I was inside and I was thinking to myself about what you were mentioning with this under the line, the comment.

What I can remember now that is this about it, some of the jurors had requested whether or not they could get xerox copies made from this particular book as an aid in determing some of the questions that we had about the CPA title, things like that. That's what I just wanted to tell you that I remembered.

Q. Do you remember anything else about it?

A. That's it. I just happened to remember that.

Q. Do you remember how it came about that the jurors want to know if they could get xerox copies?

A. Only the fact that some of them, like the letter said, did not know the meaning of a CPA and they weren't sure on whether or not an outside text was permissible as part of the what you call it.

Q. Deliberations.

A. Right.

Q. Do you know how they knew the name either Miegs or Miegs and Miegs (Meegis)?

A. One of the jurors mentioned that book by name.

Q. Do you recall what he said about it?

A. Only the fact that the book would probably help us in determining the term CPA and what a CPA is more clearly.

Q. Do you recall any other discussion?

A. No, that was about it.

Q. All right, Mr. Schwartz, thank you much.

A. Okay.

(Juror No. 8, Drew Schwartz, was excused from the jury room)

THE CLERK: This is Mr. Isaac Robinson.

(Juror No. 12, Isaac Rosinson, entered the jury room)

Examination by the Court:

Q. Mr. Robinson, you remember your oath as a juror?

A. Right.

Q. It still goes on as of today.

On the 26th of November, which was the day before the verdict in this case, this note was sent to me by the jury. We called it Exhibit Y. I want you to read that note to yourself and then I am going to ask you some questions about it.

A. All right.

(Pause.)

Q. All right.

Now, Mr. Robinson, did you either see that note being prepared or was it read to you as a member of the deliberating jury before it was sent out to the courtroom?

A. It was read to us.

Q. And with reference to what is below the line, I am going to read to you now what, comment I made about what is below the line. After I read the note to the jurors sitting in the jury box, I said "As far as that is under the lien on the paper, I don't understand what it means. So it will return the note to the jury and if you will write a further note if you desire in explanation of what it means 'Underline xerox sentences' et cetera. We cannot figure out what that means."

So my question to you is to ask you what you remember about what this means, "underline xerox sentences"?

Do you have any memory of what the particular line means?

A. I don't exactly remember.

Q. Was it in reference to what is above the line?

A. I think it was written in reference to what is above the line.

Q. Was there a xerox in the room?

A. A xerox? You mean—in the room, no.

Q. Was there any discussion—let me see. The name, the name here, Miegs and Miegs or Miegs and Miegs (Meegis), that is an accounting text book?

A. Yes.

Q. Does that refresh your recollection at all?

A. I think—somebody spoke about accounting.

Q. Speak loudly?

A. Somebody spoke about accounting, because I know a little bit about bookkeeping and I think—one of them had the book but we did not use the book as a reference. He only mentioned about accounting.

Q. Do you recall what was mentioned?

A. Something to the effect about CPA—

Q. Just take your time, relax.

A. And referring to CPA and Mr. Weiss in those category. I think that's what the basis of the argument was.

Q. How was the reference to the book made about a CPA?

A. I don't recall exactly.

Q. Well, as best you can recall, it would be helpful to us.

A. I know that was Miegs and Miegs was a top accounting writer for accounting or something to that effect and they mentioned, I think, aobut Mr. Weiss and a CPA.

Q. Do you recall what the mention was about that? That's what we would like to know.

A. I think the argument was based on his experience in accounting. In other words, his experience in accounting and based, in fact, he knows what he was—

Q. We have to have your words. You tell us as best you can in your words.

A. In my words, just he knows his accounting.

Q. How did you know that he knows his accounting?

A. From our collective argument, you know pro and con.

Q. Let me put it to you directly, Mr. Robinson.

Was the mention of the accounting book Miegs and Miegs, did that have any relationship to your discussion about what Mr. Weiss would know as a CPA?

A. No. I don't know anything of Miegs and Miegs as such.

Q. I know. I know you don't know anything about Miegs and Miegs, or the book, or what was discussed in the book as bearing upon what a CPA would know.

A. For me, no.

Q. Not from you but from anybody in the room. Was there any discussion by any of the jurors about that?

A. I don't remember directly.

Q. Now, I see you told us some things and—what do you remember was discussed—well, let me start again.

Do you remeber the book being discussed at all, the accounting book by anybody?

A. The book as such, I know there was mention about the book but—I don't remember the exact argument about the book itself. The only thing I can put together is it was led up to compare Mr. Weiss with—as an accountant with this accounting.

Q. Compare Mr. Weiss as an accountant with this accounting—

A. It was mentioned, I think, in drawing reference, I think after we went back about the CPA and around that, that's where it, Miegs and Miegs came in.

Q. You see, that's what I'm trying to search your recollection about how did Miegs and Miegs come in? When you say it came in, we want to know how it came in?

A. It was the argument I know one fellow mentioned.

Q. Well, Mr. Sutherland's name is written here. That was juror number three.

A. Right.

Q. Does that refresh your recollection at all?

A. Mr. Sutherland?

Q. Mr. Sutherland, yes.

A. Oh, Sutherland, I was thinking of the other one.

Q. He was the third juror?

A. Yes. He's the one that mentioned it.

Q. He was the one who said what?

A. Related the comparison.

Q. The comparison between what?

A. CPA and Miegs and Miegs, was done after the first note for an explanation.

Q. Did the explanation—who did the explanation come from?

A. Mr.—

Q. Sutherland?

A. Sutherland. He brought it up. The comparison, if I remember correctly.

Q. All right, Mr. Robinson, suppose you step outside for a moment and let me speak to the lawyers and see.

(Juror No. 12, Isaac Robinson, was excused from the jury room)

THE COURT: The problem with Mr. Sutherland is he's inarticulate about certain things. I'm sorry, I said Mr. Sutherland, I meant Mr. Robinson.

Any further questions?

MR. AKERMAN: No.

THE COURT: Mr. Kasanof?

MR. KASANOF: Nothing, your Honor.

THE COURT: Would you ask him if he wants to go home by limousine?

MR. KASANOF: Your Honor, I note you didn't give him the customary little chatter about discussing this case.

THE COURT: I will. It is most necessary.

(Juror No. 12, Mr. Isaac Robinson, returned to the jury room)

THE COURT: Mr. Robinson, I just want to say to you I don't want you to discuss what I asked you and what you told us with anybody, any other jurors or anybody else?

MR. ROBINSON: Sure, okay.

THE COURT: Thanks so much. It is good seeing you again.

(Juror No. 12, Isaac Robinson, was excused from the jury room)

THE COURT: All right, gentlemen.

MR. KASANOF: Your Honor—

THE COURT: When will the briefs be prepared?

MR. KASANOF: There is another matter. It seems to me that I would request that your Honor have your able clerk identify which marshal was on duty that day and communicate an instruction to that marshal not to have any instructions and then we reconvene at your Honor's convenience to examine that marshal.

Mr. Sutherland has said that that marshal kept books and that when the jury sent a note to your Honor, as I read it or I remember Mr. Sutherland's discussion, that attached to the note was the proposed underlined passage from Miegs and Miegs accounting. As we all understand that never arrived. it was not part of the note as your Honor received it—

THE COURT: That is for sure.

MR. KASANOF: And it was not part of the note as your clerk has not produced it from your files. I think this inquiry cannot be full circle without seeing what the marshal's recollection is about the note and the books.

THE COURT: I can certainly say, Mr. Kasanof and Mr. Akerman and everybody else, if I had seen anything like that, we wouldn't be sitting here today, because it would have been on the record of the court. Right?

MR. AKERMAN: That's right.

THE COURT: Because we were puzzled as to what it meant.

Can we find out who the marshal was? But not tonight.

THE CLERK: The only way I can think of is for the judge to ask the marshal to identify himself on the record.

THE COURT: The Marshal's office should have a log of who was on duty.

MR. AKERMAN: My only question is what is the point of it? Mr. Sutherland already told us what it is about. He's the best first-hand source. The fact that a marshal may have been derelict in his duty, I'm not sure what that might accomplish.

MR. KASANOF: I would not like to leap to the conclusion that the marshal was derelict in his duty and leave open the possibility we have not had a full account. I am certainly not making a criticism of the marshal without having heard him. Since this was the Friday between Thanksgiving and Saturday, it seems to me reasonably likely that the marshal service, which probably was not really active on that day as I recall, that the marshal service may have a duty roster or something of that sort. And I think the impartial way of doing that is to have your Honor's clerk make the inquiry and we are requesting an examination and if you object—well, I would like to go on that.

THE COURT: I have no problem in having the marshal here, absolutely none. I don't know how soon that can be done. Do you, gentlemen, want to see the other two jurors we couldn't get in today?

MR. AKERMAN: I don't think there is any point to it, judge. I think we have gotten the facts from the other jurors.

MR. KASANOF: Judge, I'm a slow thinker and if your Honor will indulge me.

THE COURT: You don't want me to agree with you, do you?

MR. KASANOF: I certainly do not. But I want to use it as an excuse to get—

THE COURT: I know you too well. I watched you try a case.

MR. KASANOF: I would like a chance to think it over and report it to your Honor tomorrow or the next day about that.

I believe with the agreement of the government, we ask your Honor to continue the seal on these minutes with the exception that they may be used by counsel for good faith preparation of the proceeding before your Honor, shown, if necessary, to the Defendant Weiss and I undertake to represent to him that he is under a restraint as long as the

proceeding is going forward not to discuss it or disclose them.

THE COURT: Do you say I do, Mr. Akerman?

MR. AKERMAN: I do.

THE COURT: All right. With the assumption that, today is Wednesday, you will certainly receive the minutes by Friday, assuming, again, that you do not want additional testimony, can you project when you would have the briefs so that—I'm on trial and I have got a whole lot of things—

MR. KASANOF: I would like three weeks. I would like three weeks from the time I receive the minutes.

MR. AKERMAN: I can take it, as a proponent of the motion, Mr. Kasanof will file his brief first?

THE COURT: And you have the right to respond.

MR. AKERMAN: I don't think I will need that much time to respond since I think we all know what the issues are about. I think within a few days after Mr. Kasanof's brief—

THE COURT: Will one week be fair to you Mr. Akerman?

MR. AKERMAN: I think I will be a lot—

MR. KASANOF: How about simultaneous filings and cross replies? I am just trying to be helpful.

MR. AKERMAN: Yes, I appreciate that.

THE COURT: Three weeks from today, whatever that date—three weeks from the receipt of the minutes, Mr. Kasanof will have his brief and Mr. Akerman will have one week, but he informs me he will be very speedy and may not take one week, but he will have one week.

MR. KASANOF: We are leaving open now the question of whether we can identify the marshal and if we can—

THE COURT: Mrs. Brouwer will attempt—what your pleasure as to whether you want to have a further hearing with the marshal?

MR. KASANOF: If we can identify the marshal—

THE COURT: You know you want to have the hearing.

MR. KASANOF: We would want to have the hearing and we would ask at least with further instruction from the court to advise the marshal not to discuss with anyone except the court—not to discuss it with anyone.

THE COURT: With anyone. The court will certainly not discuss it.

MR. KASANOF: We will by a day or two after we have the minutes report to the court through your Honor's clerk, or whatever way, whether or not we will want to see the other remaining two jurors.

THE COURT: Mr. Akerman, you have the same pleasure?

MR. AKERMAN: Right. I don't think I'm going to.

THE COURT: I will make the questionnaire that was furnished to me a part of this hearing. I will call the minutes I was reading from, I don't know who gave them to me, but I will call that Exhibit 1 on the hearing and—

MR. AKERMAN: I think a lot of these things were marked previously.

THE COURT: I am marking them for purposes of this hearing so we can identify them. The questionnaire as Exhibit 2 and we have, of course, Exhibit Y which we will keep the same designation.

MR. KASANOF: And the books remain under the same designation.

THE COURT: Yes. Mrs. Brouwer will have the books in her custody. All right.

(Record closed)

June 3, 1983

Judge Lowe
Federal District Court

Your Honor:

At some point during the trial the nature of the defendents education was discussed. It was indicated that Mr. Weiss was a CPA. Neither lawyer disagreed with this. CPA - this is not 3 randomly selected letters, it is not XYZ. CPA abbreviates CERTIFIED PUBLIC ACCOUNTANT. Certified by who to do what? What is his job? For what may be be held accountable as a CPA? A lawyer can be disbarred, a medical doctor can have his license revoked. What can happen to a CPA?

I have bracketed the quote I recited to the jury on page 7. My note, which you asked if I had written, may also have mentioned another page but I beleive I didn't bother with it. For my own edification I read pages 6,7,8 and perhaps a few other pages at home - not at the court house.

We were to use our best judgement, experience etc in evaluating the evidence presented. No one said I could not inform myself of the training and skills of a CPA. Having done so, that is my experience. The quote is a definition. It is in no way directed toward either the prosecution or the defense. Since I could not get the page entered in a formal way, it was presented as my opinion- carrying no more weight than anyone else's opinion. The argument among jurors was going on before the quote, and contiued to the end of the deliberations. The other jurors were not willing to let me rephrase the question so I dropped the issue and left it as my own opinion.

Respectfully,

Charles A. Sutherland

Charles A. Sutherland
914-779-6300 x 5977

Kindly have Kathy call me
and indicate that this statement
has been received. 615

BEST AVAILABLE COPY

SOUTHERN DISTRICT OF NEW YORK

CHAMBERS OF
MARY JOHNSON LOWE
JUDGE
U.S. COURTHOUSE
FOLEY SQUARE
NEW YORK, NEW YORK 10007

HAND DELIVERED BY DEPUTY U.S. MARSHAL

June 2, 1983

Mr. Charles A. Sutherland
222 Elwood Avenue
Hawthorne, New York 10532

Re: United States v. Solomon Weiss,
81 Cr. 636 (MJL)

Dear Mr. Sutherland:

You are requested and directed by the Court to:

1. Furnish to the Marshal who delivers this letter the copy of the Meigs & Meigs text to which you referred in the jury note and when you were before me on May 25th.

OK

2. Furnish the "xerox" referred to in the jury note and when you were before me on May 25th.

don't have

3. If you no longer have the "xerox," please mark the text to indicate the page which was xeroxed and the portion of the page which was underlined.

done p-7

Your book will be returned promptly.

Very truly yours,

Mary Johnson Lowe

cc:

Nathaniel Akerman, Esq.
Assistant United States Attorney
United States Attorney's Office
One St. Andrew's Plaza
New York, New York 10007

Robert Kasanof, Esq.
767 Third Avenue
New York, New York 10017

A186

The work of accountants

Accountants tend to specialize in a given subarea of the discipline just as do attorneys and members of other professions. In terms of career opportunities, the field of accounting may be divided into three broad areas: (*1*) the public accounting profession, (*2*) private accounting, and (*3*) governmental accounting.

Public accounting

Date received To Jurors OAS 3/June/83

Certified public accountants are independent professional persons comparable to attorneys or physicians, who offer accounting services to clients for a fee. The ***CPA certificate*** is a license to practice granted by the state on the basis of a rigorous examination and evidence of practical experience. All states require that candidates pass an examination prepared and administered on a national basis twice each year by the American Institute of Certified Public Accountants. Requirements as to education and practical experience differ somewhat among the various states.

AUDITING The principal function of CPAs is auditing. How do people outside a business entity—owners, creditors, government officials, and other interested parties—know that the financial statements prepared by a company's management are reliable and complete? In large part, these outsiders rely upon ***audits*** performed by a CPA firm which is ***independent*** of the company issuing the financial statements.

To perform an audit of a business, a firm of certified public accountants makes a careful review of the accounting system and gathers evidence both from within the business and from outside sources. This evidence enables the CPA firm to express its professional ***opinion*** as to the fairness and reliability of the financial statements. Persons outside the business, such as bankers and investors who rely upon financial statements for information, attach great importance to the annual ***audit report*** by the CPA firm. The ***independent*** status of a CPA firm retained to make an annual audit is just as important as its technical competence in assuring outsiders that the financial statements prepared by management disclose all relevant information and provide a fair picture of the company's financial position and operating results.

TAX SERVICES An important element of decision making by business executives is consideration of the income tax consequences of each alternative course of action. The CPA is often called upon for "tax planning," which will show how a future transaction such as the acquisition of new equipment may be arranged in a manner that will hold income taxes to a minimum amount. The CPA is also frequently retained to prepare the federal and state income tax returns. To render tax services, the CPA must have extensive knowledge of tax statutes, regulations, and court decisions, as well as a thorough knowledge of accounting.

Financial Accounting

THIRD EDITION

WALTER B. MEIGS, Ph.D., C.P.A.
Professor of Accounting
University of Southern California

ROBERT F. MEIGS, D.B.A.
Professor of Accounting
School of Accountancy
San Diego State University

McGRAW-HILL BOOK COMPANY

New York St Louis San Francisco Auckland Bogota Dusseldorf
Johannesburg London Madrid Mexico Montreal New Delhi Panama
Paris São Paulo Singapore Sydney Tokyo Toronto

as well as specifying the areas to be serviced and the frequency of flights. The rates charged by companies which provide electricity, gas, water, and other public utilities usually are regulated by state utilities commissions.

Regulatory agencies often require special types of accounting information specifically tailored to their needs. For example, a state utilities commission making a decision as to whether to allow a rate increase by an electric company might request information about the cost to that company of producing electricity, the company's need to accumulate funds to provide service to outlying areas, and trends in population growth. In large part, however, reports to regulatory agencies are based upon generally accepted accounting principles.

Using accounting information

Accounting extends beyond the process of creating records and reports. The ultimate objective of accounting is the ***use*** of this information, its analysis and interpretation. Accountants are always concerned with the significance of the figures they have produced. They look for meaningful relationships between events and financial results; they study the effect of various alternatives; and they search for significant trends that may throw some light on what will happen in the future.

Interpretation and analysis are not the sole province of the accountant. If managers, investors, and creditors are to make effective use of accounting information, they too must have some understanding of how the figures were put together and what they mean. An important part of this understanding is to recognize clearly the limitations of accounting reports. A business manager, an investor, or a creditor who lacks an understanding of accounting may fail to appreciate the extent to which accounting information is based upon ***estimates*** rather than upon precisely accurate measurements.

THE DISTINCTION BETWEEN ACCOUNTING AND BOOKKEEPING Persons with little knowledge of accounting may also fail to understand the difference between accounting and bookkeeping. ***Bookkeeping*** means the recording of transactions, the record-making phase of accounting. The recording of transactions tends to be mechanical and repetitive; it is only a small part of the field of accounting and probably the simplest part. ***Accounting*** includes the design of accounting systems, preparation of financial statements, audits, cost studies, development of forecasts, income tax work, computer applications to accounting processes, and the analysis and interpretation of accounting information as an aid to making business decisions. A person might become a reasonably proficient bookkeeper in a few weeks or months; to become a professional accountant, however, requires several years of study and experience.

A189

The work of accountants

Accountants tend to specialize in a given suoarea of the discipline just as do attorneys and members of other professions. In terms of career opportunities, the field of accounting may be divided into three broad areas: (*1*) the public accounting profession, (*2*) private accounting, and (*3*) governmental accounting.

Public accounting

Certified public accountants are independent professional persons comparable to attorneys or physicians, who offer accounting services to clients for a fee. The ***CPA certificate*** is a license to practice granted by the state on the basis of a rigorous examination and evidence of practical experience. All states require that candidates pass an examination prepared and administered on a national basis twice each year by the American Institute of Certified Public Accountants. Requirements as to education and practical experience differ somewhat among the various states.

AUDITING The principal function of CPAs is auditing. How do people outside a business entity—owners, creditors, government officials, and other interested parties—know that the financial statements prepared by a company's management are reliable and complete? In large part, these outsiders rely upon ***audits*** performed by a CPA firm which is ***independent*** of the company issuing the financial statements.

To perform an audit of a business, a firm of certified public accountants makes a careful review of the accounting system and gathers evidence both from within the business and from outside sources. This evidence enables the CPA firm to express its professional ***opinion*** as to the fairness and reliability of the financial statements. Persons outside the business, such as bankers and investors who rely upon financial statements for information, attach great importance to the annual ***audit report*** by the CPA firm. The ***independent*** status of a CPA firm retained to make an annual audit is just as important as its technical competence in assuring outsiders that the financial statements prepared by management disclose all relevant information and provide a fair picture of the company's financial position and operating results.

TAX SERVICES An important element of decision making by business executives is consideration of the income tax consequences of each alternative course of action. The CPA is often called upon for "tax planning," which will show how a future transaction such as the acquisition of new equipment may be arranged in a manner that will hold income taxes to a minimum amount. The CPA is also frequently retained to prepare the federal and state income tax returns. To render tax services, the CPA must have extensive knowledge of tax statutes, regulations, and court decisions, as well as a thorough knowledge of accounting.

MANAGEMENT ADVISORY SERVICES Auditing and income tax work have been the traditional areas of expertise for CPA firms, but the field of management advisory services has recently become a rapidly growing new area. When a CPA firm during the course of an audit discovers problems in a client's business, it is natural for the CPAs to make suggestions for corrective action. In response, the client often engages the CPAs to make a thorough investigation of the problem and to recommend new policies and precedures needed for a solution.

Public accounting firms gradually found themselves becoming more involved in management consulting work. Although this work often concerned accounting and financial matters, sometimes it dealt with organizational structure, statistical research, and a wide variety of problems not closely related to accounting. In recent years many CPA firms have created separate management advisory service departments which are staffed with mathematicians, industrial engineers, and other specialists as well as accountants. The experience, reputation, and independence of the CPA firms have placed them in an advantageous position to render advisory services to management over a broad range of administrative and operating problems. For example, these services might include study of the desirability of a merger with another company, the creation of a pension plan for employees, or the researching of a foreign market for the company's products.

Private accounting

In contrast to the CPA in public practice who serves many clients, an accountant in private industry is employed by a single enterprise. The chief accounting officer of a medium-sized or large business is usually called the ***controller,*** in recognition of the fact that one of the primary uses of accounting data is to aid in controlling business operations. The controller manages the work of the accounting staff. He or she is also a part of the top management team charged with the task of running the business, setting its objectives, and seeing that these objectives are met.

The accountants in a private business, large or small, must record transactions and prepare periodic financial statements from accounting records. Within this area of general accounting, a number of specialized phases of accounting have developed. Among the more important of these are:

DESIGN OF ACCOUNTING SYSTEMS Although the same basic accounting principles are applicable to all types of businesses, each enterprise requires an individually tailored ***financial information system.*** This system includes accounting forms, records, instruction manuals, flow charts, and reports to fit the particular needs of the business. Designing an accounting system and putting it into operation are thus specialized phases of accounting. With the advent of electronic data processing

11/26/82

A191

COURT'S EXHIBIT Y

this jury has been directed to use its best unbiased judgement and common sense to reach a verdict on a series of counts outlined to us. Our ability to do this fairly is dependent upon our varied, collective experiences. Most of us are unfamiliar with the nature of the Training of A ~~CA~~ CPA Mr Weiss is a CPA.

Q. do this jury entitled to know what a CPA is as opposed to a Bookkeeper.

lawyer vs legal aid
M.D. vs paramedic
Dentist vs dental tech

R.: underlined (xerox) sentences
Meigs + Meigs Charles Sutherland Jr
P. Wiener

Supreme Court, U.S.
FILED
AUG 20 1985
JOSEPH F. SPANIOL, JR.
CLERK

No. 84-1645 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1985

SOLOMON WEISS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

CHARLES FRIED
Acting Solicitor General

STEPHEN S. TROTT
Assistant Attorney General

VINCENT L. GAMBALE
Attorney

Department of Justice
Washington, D.C. 20530
(202) 633-2217

BEST AVAILABLE COPY

28 pp

QUESTIONS PRESENTED

1. Whether the object of petitioner's mail fraud scheme that the government proved at trial differed from the object alleged in the indictment.

2. Whether petitioner's conduct violated the mail fraud statute, 18 U.S.C. 1341.

3. Whether the courts below erred in determining that the jury's consideration of an extra-record definition of a certified public accountant was harmless error.

4. Whether, in a prosecution for making a false material statement in violation of 18 U.S.C. 1623, the district court erred in deciding the issue of materiality as a question of law rather than submitting it to the jury as a question of fact.

TABLE OF CONTENTS

Page

Opinions below 1

Jurisdiction 1

Statement 1

Argument 10

Conclusion 21

TABLE OF AUTHORITIES

Cases:

Falco v. *United States*, cert. denied, 460 U.S. 1068 21

Hobson v. *Wilson*, 737 F.2d 1 18

Mattox v. *United States*, 146 U.S. 140 18

Milton v. *Wainwright*, 407 U.S. 371 20

Owen v. *Duckworth*, 727 F.2d 643 18

Parr v. *United States*, 363 U.S. 370 16

Remmer v. *United States*, 347 U.S. 227 18

Rinker v. *County of Napa*, 724 F.2d 1352 18

Russell v. *United States*, 369 U.S. 749 20

Sinclair v. *United States*, 279 U.S. 263 20

United States v. *Armilio*, 705 F.2d 939, cert. denied, No. 83-55 (Oct. 11, 1984) 20, 21

United States v. *Bagnariol*, 665 F.2d 877, cert. denied, 456 U.S. 962 19

United States v. *Baptiste*, 608 F.2d 666, cert. denied, 450 U.S. 1000 ..... 20, 21

United States v. *Barnes*, 747 F.2d 246 20

Page

Cases—Continued:

United States v. *Barta*, 635 F.2d 999, cert. denied, 450 U.S. 998 17

United States v. *Bridges*, 717 F.2d 1444, cert. denied, No. 83-6062 (Feb. 21, 1984) 20

United States v. *Bryza*, 522 F.2d 414, cert. denied, 426 U.S. 912 17

United States v. *Carter*, 721 F.2d 1514 20

United States v. *Delaney*, 732 F.2d 639 18

United States v. *Littlefield*, 752 F.2d 1429 18

United States v. *Margiotta*, 688 F.2d 108, cert. denied, 461 U.S. 913 17

United States v. *Martellano*, 675 F.2d 940 20

United States v. *Maze*, 414 U.S. 395 16

United States v. *Milestone*, 626 F.2d 264, cert. denied, 449 U.S. 920 11

United States v. *Miller*, No. 83-1750 (Apr. 1, 1985) 11, 14

United States v. *Molinares*, 700 F.2d 647 20

United States v. *Prantil*, 756 F.2d 759 20

United States v. *Siegel*, 717 F.2d 9 17

United States v. *Sun Myung Moon*, 718 F.2d 1210, cert. denied, No. 83-1242 (May 14, 1984) 20

United States v. *Thompson*, 637 F.2d 267 20

Page

Constitution and statutes:

U.S. Const. Amend. V (Grand Jury Clause) 10

18 U.S.C. 1341 ..... 2, 4, 15

18 U.S.C. 1623 ..... 2, 4, 7, 8, 20, 21

18 U.S.C. 1962(c) 1

Miscellaneous:

1 C. Wright, *Federal Practice and Procedure: Criminal* (2d ed. 1982) 11

In the Supreme Court of the United States

OCTOBER TERM, 1985

No. 84-1645

SOLOMON WEISS, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A2-A37) is reported at 752 F.2d 777. The opinion of the district court (Pet. App. A38-A75) is reported at 579 F. Supp. 1224.

JURISDICTION

The judgment of the court of appeals was entered on January 7, 1985. A petition for rehearing was denied on February 20, 1985 (Pet. App. A1). The petition for a writ of certiorari was filed on April 19, 1985. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the Southern District of New York, petitioner was convicted on one count of conducting the affairs of an enterprise through a pattern of racketeering activity, in violation of 18 U.S.C. 1962(c), three counts of mail fraud, in violation

of 18 U.S.C. 1341, and three counts of perjury before the grand jury, in violation of 18 U.S.C. 1623.[1] He was sentenced to concurrent terms of five years' probation on the condition that he perform 40 hours per week of community service during the probationary period; in addition, he was fined a total of $58,000 and, on the racketeering count, ordered to forfeit his stock in Warner Communications, Inc. (Warner).

1. The extensive evidence at trial is summarized in the opinions of the court of appeals and the district court (Pet. App. A5-A7, A45-A59). In brief, it showed that between 1973 and 1977 petitioner, who was at that time the Assistant Treasurer of Warner, created a cash fund consisting of kickbacks from Warner's purchases of stock in the Westchester Premier Theatre (WPT) and rebates from corporate expenditures for non-existent services. To conceal the existence of the fund from Warner shareholders, petitioner also falsified Warner records.

In May and June 1973, WPT conducted a public stock offering to raise $2 million for construction costs. Under the terms of the offering, WPT had to return all stock sale proceeds to investors unless it sold at least 275,000 shares at $7.50 per share by June 12, 1973. In an effort to meet this requirement, WPT principal Leonard Horwitz offered secret inducements to select purchasers, including Warner. In late May 1973, Horwitz told Jay Emmett, a vice-president of Warner, that WPT would loan him $50,000 in cash if he bought 10,000 shares of WPT stock. Although Emmett declined, he said that Warner might be interested, and he presented the offer to Steven Ross, the Chairman of the Board of Warner. Ross responded that Warner could not accept such a loan, but that Horwitz "ought to meet

---

[1]Petitioner was acquitted by the jury on six other counts.

with [petitioner] and maybe he could be helpful in the Warner cash fund" (Pet. App. A5, A46-A47; C.A. App. 714-725, 1258-1260, 2738).

Thereafter, petitioner and Horwitz met to discuss the matter. Petitioner told Horwitz that Warner could help since it "always had a need for cash," and he proposed that Warner would buy 20,000 WPT shares for $150,000 if WPT would "kick back" $100,000 to Warner. Horwitz accepted that deal, gave petitioner $50,000 in cash, and promised to provide petitioner with another $50,000 at a subsequent time. However, WPT was unable to produce the additional $50,000, and the deal was accordingly modified so that petitioner would give Horwitz $50,000 in Warner funds as payment for non-existent services in return for a $20,000 cash kickback. Petitioner then provided WPT with $30,000 in the form of a Warner check issued to an attorney whose law partner worked with Horwitz on the WPT stock offering. To conceal that transaction, petitioner directed Horwitz to prepare a back-dated invoice to make it falsely appear that the $30,000 was for legal services performed for Warner (Pet. App. A5-A6, A47-A50; C.A. App. 131-132, 508, 562-571, 700-701, 735-750, 1034-1050, 1263-1276; GX 39, 43-49, 159-160, 162A-F, 200).

In July 1973, petitioner used Warner funds to purchase an additional 20,000 shares of WPT stock for $100,750 in return for Horwitz's promise to give Warner a $100,000 rebate when the theatre opened in 1974. When the theatre did not open as planned, petitioner and Horwitz devised a new scheme to supplement the Warner cash fund. Between 1974 and 1977, petitioner issued ten Warner checks totalling $171,950 to Horwitz and Bruce Kosman, an attorney associated with WPT, for fictitious work performed for Warner; Horwitz then paid $100,000 in cash to petitioner. In order to make it appear that the payments for non-existent services were legitimate, petitioner created false

documents in Warner's accounting system and caused phony invoices and reports to be submitted to Warner (Pet. App. A6, A50-A55; C.A. App. 621, 641-654, 751-784, 817-854, 1276-1309, 1321-1331, 2148-2152; GX 54-129). Petitioner subsequently testified falsely in the grand jury that he was unaware of Horwitz's connection to Warner's purchase of WPT stock or of Warner's payments for fabricated legal services (Pet. App. A7, A49-A50; C.A. App. 1364-1367; GX 164, 232).

2. Following his conviction, petitioner moved for a judgment of acquittal or a new trial on several grounds. First, he sought a new trial because one of the jurors had presented to the jury during its deliberations an explanation from a standard accounting textbook of the responsibilities and training of certified public accountants as distinguished from bookkeepers; petitioner had testified at trial that he was a CPA, and he contended that the extra-record material was prejudicial because the jury might have relied on it in determining the issue of his criminal intent. In addition, with respect to the racketeering and mail fraud counts, petitioner argued that the government's proof at trial showed a different object of the fraud scheme (the acceptance of bribes and conversion of corporate assets to create the Warner cash fund) than was charged in the indictment (bribery and conversion for personal benefit) and that this shift violated his constitutional right to a grand jury indictment and prejudiced his preparation of a defense. Petitioner also argued that the conduct shown by the government's evidence did not fall within the mail fraud statute, 18 U.S.C. 1341, because it did not establish that the fraudulent scheme resulted in a personal monetary benefit to petitioner. Finally, petitioner asserted that the issue of the materiality of his perjurious statements before the grand jury under 18 U.S.C. 1623 had to be submitted to the jury as a question of fact and not resolved by the court as a question of law.

The district court rejected each of these arguments and denied petitioner's motion (Pet. App. A38-A75). With respect to the issue of jury taint, the court noted that " 'extra-record information that comes to the attention of a juror is "presumptively prejudical" ' " and that to rebut the presumption there must be "an affirmative showing on the part of the government that the information is harmless" (*id.* at A60 (citations omitted)). Based on a post-trial evidentiary hearing (*id.* at A40-A45) and "[a]n exhaustive review of the record" (*id.* at A65), the court found that "the independent evidence of [petitioner's] criminal knowledge was so 'abundant' as to render the infiltration of the textbook definition harmless" (*ibid.*). In particular, the court cited the direct testimony of Emmett and Horwitz as government witnesses and the "substantial circumstantial proof of [petitioner's] guilt" (*ibid.*), as well as the evidence in the record of petitioner's professional background and business experience (*id.* at A66). The court further noted that the extra-record material was "neutral * * * and not inherently inculpatory" (*id.* at A62). Thus, the court determined that (*id.* at A66)

> [i]n light of the other evidence in the record as to [petitioner's] professional background and corporate responsibilities, and the strong circumstantial evidence supporting the testimony of Emmett and Horwitz, * * * the possibility of prejudice arising from the infiltration of the extra-record matter is slight. There is ample evidence, exclusive of the extra-record information, to sustain the verdict.

The district court also held that the mail fraud statute applied to petitioner's "fraud * * * against Warner shareholders * * * [by] the creation of a cash fund through bribery and the theft of Warner's assets" and by his failure to "disclose the existence of this cash fund or this theft of Warner's assets" (Pet. App. A70). This scheme violated the

"fiduciary duty" that petitioner, as "an executive officer of Warner, * * * owed * * * to its stockholders to provide honest services and to perform his job in their best interests" (*ibid.*). As the court summarized the case against petitioner (*id.* at A71-A72) (footnote omitted):

> [Petitioner was involved in] a scheme for the creation of a cash fund by the acceptance of kickbacks, conversion of corporate assets and the creation of false documentation to conceal the wrongful acts. * * * [T]here can be no serious dispute that the creation of false and fraudulent corporate documents by a corporate officer to conceal payments from the corporate treasury of monies expended for non-existent services, is a fraud on the corporation.
>
> * * * [Petitioner's] argument simply ignores the fact that [petitioner], in generating the cash fund caused economic injury in buying $250,000 of speculative WPT stock and in paying out $221,950 of corporate assets for non-existent services, in return for only $170,000 in cash.

For these reasons, the court rejected petitioner's assertion that his conduct did not breach any legal duty and therefore did not come within the mail fraud statute.

The district court likewise rejected petitioner's argument that there was "a 'shift in theory' or a constructive amendment of the indictment" (Pet. App. A73) because the grand jury returned its charges based on petitioner's involvement in bribery and theft of corporate monies but the case was tried on the theory that petitioner had created a secret cash fund (*id.* at A72). The court pointed out that, consistently with the indictment, the government's proof at trial showed "that through bribery (the initial cash payment by Horwitz to [petitioner]) and theft by [petitioner] and others of corporate monies, a secret cash fund was established" (*id.* at

A73). Contrary to petitioner's characterization, inclusion of proof of the cash fund at trial "was not an alternative theory, but simply traced the proceeds of the illegal scheme" (*id.* at A74). Moreover, the jury had been specifically instructed that it had to " 'determine whether the credible evidence established the existence of the fraudulent scheme charged in the indictment' " (*id.* at A73). And "neither at trial nor during the jury charge conference did [petitioner] ever object to the evidence or instructions concerning the cash fund" (*ibid.*), as would be expected if the government's trial theory departed from the grand jury charge.

Finally, the district court found no error in its ruling during trial that the issue of the materiality of petitioner's perjurious statements before the grand jury would be decided as a question of law under 18 U.S.C. 1623 and not submitted to the jury as a question of fact (Pet. App. A75).

3. The court of appeals affirmed (Pet. App. A2-A37). With respect to the first three issues, the court found "little merit in [petitioner's] contentions" (*id.* at A7). First, it held that the district court, which conducted "an exhaustive evidentiary hearing" (*id.* at A10), had not abused its discretion in finding that the jury's consideration of the extra-record material on CPAs was "harmless" (*ibid.*). Assessing "the 'possibility of prejudice' by reviewing the entire record, analyzing the substance of the extrinsic evidence, and comparing it to that information of which the jurors were properly aware" (*ibid.*), the court of appeals sustained the district court's determination that the extra-record information in this case was not prejudicial.

In addition, the court of appeals held that petitioner's conduct constituted a violation of the mail fraud statute (Pet. App. A10-A15). After concluding that the statute is not limited to fraudulent schemes in which "the misappropriated funds [a]re used by [a defendant] for his own enrichment" (*id.* at A13), the court explained that in this case petitioner "formulated an elaborate plan, involving

phony cash-generating transactions, to disguise the [cash] fund from the shareholders at Warner" (*id.* at A14). To further his plan, petitioner "created fake feasibility studies and bogus tasks for real estate consultants, issued checks for non-performed legal services, and purchased large amounts of speculative stock" (*ibid.*). This "scheme to create a cash fund via the acceptance of kickbacks, the conversion of corporate assets into non-performed services, and the creation of false and fraudulent documents to conceal and disguise these illicit transactions were unquestionably acts of fraud on the corporation" (*ibid.*).

Relying on well-settled law in the circuit, the court of appeals also held that the issue of materiality in a perjury prosecution under 18 U.S.C. 1623 is a question for the court and not for the jury (Pet. App. A17).

Finally, the court of appeals rejected petitioner's argument that there was an impermissible shift in the government's theory of the case that violated his constitutional right to a grand jury indictment and prejudiced his preparation of a defense (see Pet. App. A18). The court found that "the government's theory and the proof offered at trial fairly reflect the charges set forth in the indictment" (*id.* at A20). In particular, the indictment was "conspicuously silent on the ultimate destination of the fraudulently obtained funds," and nothing in the charged offenses "would preclude the grand jury from assuming that the monies ended up somewhere other than in [petitioner's] pockets" (*id.* at A23). Thus, "the cash fund evidence did not change the theoretical basis of the fraudulent scheme. Rather, as the trial court concluded, '[t]he cash fund proof offered at trial was not an alternative theory, but simply traced the proceeds of the illegal scheme' " (*ibid.* (citation omitted)). Since "the cash fund evidence presented at trial was virtually identical to the proof that was before the grand jury" (*id.* at A22), and since the government's case at

trial tracked the allegations of the indictment with respect to the dates of transactions, the amounts of money being exchanged, the identities of the participants, and the types of fraudulent conduct involved in petitioner's scheme (*id.* at A24), the court held that there was no constructive amendment of the indictment.

The court of appeals also rejected petitioner's argument that, even if no constructive amendment had occurred, the government's theory at trial was a "surprise shift" that "prejudiced [him] in the preparation of his trial strategy" (Pet. App. A25). First, the government had advised petitioner ten months prior to trial "that it would not claim that he had kept any of the money for his own personal use," and hence petitioner "was on notice well before trial that 'conventional' bribery was not part of the government's case" (*id.* at A26). Similarly, "the cash fund theory was set forth in unequivocal terms at the time of the government's opening statement, throughout the remainder of the trial, and in the jury charge conference" (*id.* at A25); despite this, petitioner "at no time * * * raise[d] an objection to the evidence or to the instructions regarding this theory, nor did [petitioner] ever request a continuance of trial on grounds that he had not been given adequate notice of the government's case" (*ibid.*), and this "failure to object militates against any argument that he was surprised by or not prepared to defend against the cash fund theory" (*id.* at A26). And petitioner's defense at trial — that "he knew nothing either about a scheme to sell Theatre stock or about a plan to establish a cash fund at Warner, that he never received any cash payments, and that he issued Warner checks only upon the authorization of his superiors" (*id.* at A27) — was equally applicable to the "bribery" and "cash fund" theories; under either theory, the central issue at trial was "a credibility contest between [petitioner] and the witnesses of the government" (*ibid.*; see also *id.* at A4), which presented

a jury question that the trier resolved against petitioner. Accordingly, "[t]he record clearly establishes that [petitioner] had adequate notice of the nature of the charges against him" and that he "had and utilized the opportunity to contest on this ground and was not substantially prejudiced in his trial preparations" (*id.* at A27).

Judge Newman dissented from the affirmance of the racketeering and mail fraud convictions on the ground that the government's proof at trial constituted an unconstitutional constructive amendment of the indictment (Pet. App. A28-A37).[2] As Judge Newman construed the indictment and the proof at trial, he concluded that there had been an improper shift from the "bribery" scheme charged in the indictment to the "cash fund" scheme proved at trial.

ARGUMENT

In thorough opinions upon which we rely, both the district court and the court of appeals have rejected each of petitioner's claims. The decision below does not conflict with any decision of this Court or any other court of appeals, and further review is not warranted.

1. Petitioner's principal contention (Pet. 5-16) is that there was a constructive amendment of the indictment in this case, in violation of the Grand Jury Clause of the Fifth Amendment, because the object of the mail fraud for which he was convicted at trial differed from the object of the fraud set forth in the indictment. More specifically, petitioner argues that the indictment charged mail fraud involving bribery and conversion of corporate assets, which in his

---

[2]Judge Newman indicated that he agreed with the panel majority that petitioner's conduct as proven at trial constituted a violation of the mail fraud statute and that his convictions were not invalid because of the extra-record material that was before the jury or the district court's resolution of the materiality issue as a matter of law (Pet. App. A35, A37).

view necessarily entailed an implicit allegation that he was personally enriched at the expense of the corporation, while the government's trial proof showed a mail fraud scheme to create and maintain a secret cash fund for Warner that did not inure to petitioner's benefit but rather remained within the control of the corporation. In addition, petitioner argues that the court of appeals erred in concluding that there was no constructive amendment because the alleged shift in the government's theory did not prejudice his trial preparations. Petitioner's position reflects a misreading of the indictment in this case and a misperception of the court of appeals' decision.

a. There is no dispute here concerning the applicable legal principle, recently reaffirmed by the Court, that "a conviction cannot stand if based on an offense that is different from that alleged in the grand jury's indictment." *United States* v. *Miller*, No. 83-1750 (Apr. 1, 1985), slip op. 12. Rather, the only issue is whether, on the record in this case, the scheme to defraud that was proved at trial was in fact different from the one alleged in the indictment. This fact-bound question provides no basis for further review.

In any event, the court of appeals correctly concluded that there was no constructive amendment of the indictment.[3] As the objects of the mail fraud scheme, the indictment charged that petitioner (Pet. App. A79)

> did secretly and corruptly extract and accept cash bribes in return for which [he] caused Warner to purchase common stock in the Westchester Premier Theatre,

that he

---

[3]The government also argued in the court of appeals that petitioner had waived this issue by failing to raise it at trial. See, *e.g.*, *United States* v. *Milestone*, 626 F.2d 264, 266-267 (3d Cir.), cert. denied, 449 U.S. 920 (1980); 1 C. Wright, *Federal Practice and Procedure: Criminal* § 127, at 417 (2d ed. 1982). The court of appeals found it unnecessary to decide the case on the basis of waiver (Pet. App. A26).

> did secretly and corruptly siphon and convert approximately $221,950 in checks which belonged to Warner and its shareholders,

and that

> in order to siphon and to convert the checks from Warner and to conceal the fraudulent conversion of those checks, * * * [he] did cause fraudulent documents to be prepared.

Petitioner makes no contention that the government's proof at trial departed from the allegations of the indictment with respect to either the occurrence or the particulars of the transactions charged; on the contrary, as the court of appeals observed, the government's evidence "closely followed the terms of the indictment" (*id.* at A21) and "was virtually identical to the proof that was before the grand jury" (*id.* at A22; see also *id.* at A22-A23, A24). Instead, petitioner contends that the indictment charged him with participating in these fraudulent acts in order to enrich himself at the expense of Warner but that the government's case at trial showed that he engaged in such acts for the purpose of creating a secret corporate cash fund that did not rebound to his personal benefit. The language of the indictment does not support petitioner's restrictive reading of its charge.

In essence, the elements of petitioner's fraud are that he breached a fiduciary duty to act honestly and in good faith in the best interest of the corporation and that he concealed material information concerning that breach in violation of a duty to disclose (see Pet. App. A11, A69). In this case, as alleged in the indictment and proven at trial, petitioner breached his fiduciary obligation to Warner and "caused [it] economic injury in buying $250,000 of speculative WPT stock and in paying out $221,950 of corporate assets for non-existent services, in return for only $170,000 in cash"

(*id.* at A71-A72 (footnote omitted)); in other words, "Warner paid out over $470,000 for non-performed services and for stock of questionable value" (*id.* at A6). In addition, as further alleged in the indictment and proven at trial, petitioner never disclosed these transactions but instead affirmatively sought to conceal them by creating false documents and records. Thus, there was no inconsistency between the indictment and the government's case at trial.[4]

While the wording of the indictment would certainly have allowed proof at trial that the moneys were obtained for petitioner's personal benefit, the described offense did not depend on establishing such a motive. The fundamental nature of the charges against petitioner was not altered by the fact that the bribes, kickbacks, and converted assets involved in the fraudulent scheme were ultimately used to create a secret cash fund at Warner. The court of appeals provided a complete answer to petitioner's argument that the gravamen of the charge against him was that he personally enriched himself at the expense of the Warner shareholders (Pet. App. A23):

> The language of the indictment is conspicuously silent on the ultimate destination of the fraudulently obtained funds. Nothing in the definition or the generally accepted meaning of a "bribe", commercial or otherwise, would preclude the grand jury from assuming that the monies ended up somewhere other than in [petitioner's] pockets.

---

[4]Petitioner objects that the district court instructed the jury that " '[t]he government contends that the fraudulent scheme was the creation of the cash fund at Warner' " (Pet. App. A73). However, as the court of appeals explained (*id.* at A23), "it is clear that the trial judge's reference to the creation of a 'cash fund' in the court's charge to the jury was nothing more than a shorthand expression for the fraudulent scheme outlined and charged in the indictment."

> Frankly, the cash fund evidence did not change the theoretical basis of the fraudulent scheme. Rather, as the trial court concluded, "[t]he cash fund proof offered at trial was not an alternative theory, but simply traced the proceeds of the illegal scheme."

b. Contrary to petitioner's assertion, the court of appeals did not excuse a constructive amendment of the indictment on the ground that petitioner had suffered no prejudice. Rather, the court recognized that, even if the basic charges against a defendant were not unconstitutionally altered, a variation between the indictment and the proof at trial "may still deprive the defendant of an opportunity to meet the prosecutor's case" (Pet. App. A25). See also *Miller*, slip op. 4-5, 8 n.5. Accordingly, having found that there was no constructive amendment, the court proceeded to consider — and reject — petitioner's separate argument "that he was prejudiced in the preparation of his trial strategy by a surprise shift in the government's theory of the case" (Pet. App. A25).[5]

The court of appeals' rejection of petitioner's argument is correct. First, it is undisputed (see Pet. 15; Pet. App. A26) that "ten months prior to trial, the government informed [petitioner] that it would not claim that he had kept any of the money for his own personal use. Thus, * * * [petitioner] was on notice well before trial that 'conventional' bribery was not part of the government's case" (*ibid.*). In addition, petitioner neither objected to the government's evidence or

---

[5]We note that the portion of the court of appeals' opinion upon which petitioner focuses in making this argument (Pet. 6) is contained in the court's discussion of the issue whether petitioner waived his claim by not preserving it at trial (see Pet. App. A25-A26), which, as discussed above (see page 11 note 3, *supra*), was not the basis for the court's decision. In addition, in most of the "long line of Second Circuit cases" to which petitioner objects (Pet. 7), this Court declined to grant review (see Pet. App. A26).

the court's instructions, nor sought a continuance of the trial because of a lack of adequate notice, even though "the cash fund theory was set forth in unequivocal terms at the time of the government's opening statement, throughout the remainder of the trial, and in the jury charge conference" (*id.* at A25). Plainly, as the court below noted, this "failure to object militates against any argument that [petitioner] was surprised by or not prepared to defend against the cash fund theory" (*id.* at A26). Finally, petitioner's defense at trial — "that he knew nothing either about a scheme to sell Theatre stock or about a plan to establish a cash fund at Warner, that he never received any cash payments, and that he issued Warner checks only upon the authorization of his superiors" (*id.* at A27) — was fully responsive to the cash fund theory but was simply not accepted by the jury in light of the government's case (*ibid.*). In sum, "[t]he record clearly establishes that [petitioner] had adequate notice of the nature of the charges against him * * *, [that he] had and utilized the opportunity to contest * * * [the charges, and that he] was not substantially prejudiced in his trial preparations" (*ibid.*).

2. Petitioner next contends (Pet. 16-20) that the conduct established at trial was not a violation of the mail fraud statute, 18 U.S.C. 1341. Petitioner does not claim that the court of appeals' ruling conflicts with the decisions of other courts, however, and his interpretation of the mail fraud statute is without merit.[6]

Petitioner complains that the mail fraud statute is unduly broad and that his scheme to receive cash kickbacks and to conceal and falsify corporate records should not be held to be within its reach. But this Court has recognized that the

---

[6]The panel of the court of appeals was unanimous in rejecting petitioner's arguments on this and the following two issues.

statute was intended to be broad and to encompass all fraudulent schemes in which, as is unchallenged here, the use of the mails is a part of the execution of the fraud. See, *e.g., United States* v. *Maze*, 414 U.S. 395, 399-400 & n.4, 405 n.10 (1974); *Parr* v. *United States*, 363 U.S. 370, 389-390 (1960). Moreover, the statute is not limited to established forms of fraud but applies equally to novel schemes. See *Maze*, 414 U.S. at 399 n.4; *Parr*, 363 U.S. at 391.

The mail fraud statute does not specify the schemes it proscribes but instead encompasses frauds as defined by other laws. See *Parr*, 363 U.S. at 389. Under this standard, it is clear, for the reasons given by the courts below, that petitioner's conduct constituted a fraud.

The courts below stated that "[a]n employee's breach of a fiduciary duty, standing alone, will not support a mail fraud violation. Rather, the government must also prove that while under a duty to disclose material information to his employer, an employee failed to do so" (Pet. App. A11; see also *id.* at A69). In this case, petitioner's underlying scheme, as summarized by the district court, involved "the creation of a cash fund by the acceptance of kickbacks * * * [and] conversion of corporate assets" (*id.* at A71); as a result, petitioner "caused economic injury [to the corporation] in buying $250,000 of speculative WPT stock and in paying out $221,950 of corporate assets for non-existent services, in return for only $170,000 in cash" (*id.* at A71-A72 (footnote omitted)). Moreover, "[a]t no time did [petitioner] ever disclose the existence of this cash fund or this theft of Warner's assets to Warner's stockholders or to anyone * * * [even though s]uch a disclosure by [petitioner] was mandatory in light of the fact that * * * [he was] an executive officer of Warner * * * * *. [Instead, he engaged in] the creation of false documentation to conceal the wrongful acts" (*id.* at A70, A71). On this record, the district court held that "the creation of false and fraudulent corporate

documents by a corporate officer to conceal payments from the corporate treasury of monies expended for non-existent services * * * is a fraud on the corporation" (*id.* at A71). This analysis, which was upheld by the court of appeals,[7] correctly concludes that petitioner's scheme was fraudulent under the mail fraud statute. See also *United States* v. *Siegel*, 717 F.2d 9, 10-14 (2d Cir. 1983); *United States* v. *Margiotta*, 688 F.2d 108, 112 (2d Cir. 1982), cert. denied, 461 U.S. 913 (1983); *United States* v. *Barta*, 635 F.2d 999, 1006-1007 (2d Cir. 1980), cert. denied, 450 U.S. 998 (1981); *United States* v. *Bryza*, 522 F.2d 414 (7th Cir. 1975), cert. denied, 426 U.S. 912 (1976).

3. Petitioner also argues (Pet. 20-27) that both courts below erred in finding that the jury's consideration of extra-record information on the responsibilities and training of certified public accountants was harmless error in this case. Petitioner's claim does not warrant further review.

---

[7]See Pet. App. A14:

> [Petitioner] formulated an elaborate plan, involving phony cash-generating transactions, to disguise the fund from the shareholders at Warner. He created fake feasibility studies and bogus tasks for real estate "consultants," issued checks for non-performed legal services, and purchased large amounts of speculative stock. The District Court found that the scheme to create a cash fund via the acceptance of kickbacks, the conversion of corporate assets into non-performed services, and the creation of false and fraudulent documents to conceal and disguise these illicit transactions were unquestionably acts of fraud on the corporation. We agree with this finding.

See also *id.* at A35 (Newman, J., dissenting in part on other grounds):

> I do not doubt that some of [petitioner's] conduct could have been the basis of a valid mail fraud conviction. The issuance of checks falsely prepared to reflect the performance of non-existent services is a fraud on someone, ultimately the shareholders, who are deprived of an opportunity to know how corporate funds are being spent.

Petitioner urges (Pet. 23) that extra-record material should be considered "presumptively prejudicial" and that the prosecution has "the burden of proving harmlessness beyond a reasonable doubt" in order to rebut the presumption of prejudice. But both the district court and the court of appeals treated the information here as presumptively prejudicial and required an affirmative showing on the part of the government that the information was harmless (Pet. App. A9, A60). Moreover, while they did not use the phrase "beyond a reasonable doubt," the courts "assess[ed] the 'possibility of prejudice' " (*id.* at A9) and specifically concluded that the error was "non-prejudicial" (*id.* at A9, A61) and "harmless" (*id.* at A10, A63, A65); indeed, in conformity with the harmless-error standard, the district court made an express finding that "the possibility of prejudice * * * is slight" (*id.* at A66). Especially in view of the well-established doctrine of constitutional harmless error (see Pet. 23), the decisions below cannot be considered to be inconsistent in any substantive way with the rule proposed by petitioner.[8]

---

[8]Indeed, the lack of meaningful difference between the decisions below and those upon which petitioner relies is illustrated by the very authorities cited in the petition (Pet. 22). On the one hand, petitioner contends that the Ninth Circuit follows the "beyond a reasonable doubt" standard. See *United States* v. *Littlefield*, 752 F.2d 1429, 1432 (9th Cir. 1985). At the same time, petitioner asserts that the Ninth Circuit, in line with the Second Circuit's decision in the present case, requires the government to make only an affirmative showing that the presumptively prejudicial extra-record information was harmless. See *Rinker* v. *County of Napa*, 724 F.2d 1352, 1354 (9th Cir. 1983). These decisions of the Ninth Circuit make evident that there is no substantial conflict on the applicable standard of harmless error. Moreover, other decisions, which petitioner acknowledges are consistent with the decision here, expressly indicate that " 'the burden [of establishing harmlessness] rests heavily upon the Government' " (*Owen* v. *Duckworth*, 727 F.2d 643, 646 (7th Cir. 1984), quoting *Remmer* v. *United States*, 347 U.S. 227, 229 (1954); see also *United States* v. *Delaney*, 732 F.2d 639, 642 (8th Cir. 1984)) and that the presumption of prejudice can be rebutted "only by a strong contrary showing" (*Hobson* v. *Wilson*, 737 F.2d 1, 47 (D.C. Cir. 1984), citing *Mattox* v. *United States*, 146 U.S. 140, 150 (1892)).

In any event, the district court's determinations, made on the basis of "an exhaustive evidentiary hearing" (Pet. App. A10), are sufficient to show that the extra-record information was harmless beyond a reasonable doubt.[9] First, the court noted that "the textbook definition of a CPA would by itself seem to be a neutral fact, and not inherently inculpatory" (*id.* at A62). In addition, the court explained that substantial evidence of petitioner's professional background and corporate responsibilities was properly before the jury (*id.* at A66):

> The fact that [petitioner] was a CPA was only one aspect of his accounting and financial background developed at trial. He was not a mere bookkeeper who simply recorded numbers. The evidence presented indicated that [petitioner] was a sophisticated business man who had earned * * * [an MBA], had over ten years' experience working in a public accounting firm prior to being hired by Warner, where he was an Assistant Treasurer, and at one point had been a Vice President, and who had significant responsibilities in financial planning for Warner's chief executives.

Finally, the court concluded (*id.* at A65) that there was " 'abundant' " evidence of petitioner's criminal intent (the issue on which the jury was allegedly influenced), including both the direct testimony of Emmett and Horwitz and circumstantial proof consisting of documentary and other

---

[9]As the court of appeals noted

> "The trial judge is uniquely qualified to appraise the probable effect of information on the jury, the materiality of the extraneous material, and its prejudicial nature. He or she observes the jurors throughout the trial, is aware of the defenses asserted, and has heard the evidence. The judge's conclusion[s] about the effect of the alleged juror misconduct deserves substantial weight."

Pet. App. A10 n.2, quoting *United States* v. *Bagnariol*, 665 F.2d 877, 885 (9th Cir. 1981), cert. denied, 456 U.S. 962 (1982).

evidence of petitioner's complicity (*id.* at A65-A66). In these circumstances, it is clear beyond a reasonable doubt that the jury's consideration of the textbook definition of a CPA could not have affected the outcome of the trial.[10]

4. Lastly, petitioner contends (Pet. 27-29) that under 18 U.S.C. 1623 the issue of the materiality of a perjurious statement must be submitted to the jury as a question of fact. As petitioner acknowledges (Pet. 27), the decisions of this Court[11] and of the courts of appeals[12] uniformly reject

---

[10]Contrary to petitioner's contention (Pet. 26-27), the courts below did not "excuse[] the prejudice introduced by the jury's consideration of the extra-record evidence" simply because there was sufficient evidence in the record to uphold his convictions. Rather, they considered "the entire record," including "the substance of the extrinsic evidence" and the "information of which the jurors were properly aware" (Pet. App. A9), to determine whether the error was harmless. A harmless error analysis must take account of the admissible evidence of guilt — which in this case was " 'abundant' " (Pet. App. A65) — in order to evaluate the possibility that the error prejudiced the jury's result. See, *e.g.*, *Milton* v. *Wainwright*, 407 U.S. 371 (1972). Notwithstanding petitioner's characterization, that does not mean, and the courts below did not hold or suggest, that an error is harmless whenever a conviction is supported by the minimum level of proof that is constitutionally required. Nor does the decision in this case conflict with *United States* v. *Barnes*, 747 F.2d 246 (4th Cir. 1984), as petitioner asserts (Pet. 26-27). Nothing in *Barnes* indicates that a court should ignore the government's case against a defendant in determining whether an error was harmless.

[11]See *Russell* v. *United States*, 369 U.S. 749, 755-756 (1962); *Sinclair* v. *United States*, 279 U.S. 263 (1929).

[12]See, *e.g.*, *United States* v. *Prantil*, 756 F.2d 759, 769 (9th Cir. 1985); *United States* v. *Carter*, 721 F.2d 1514, 1535 n.29 (11th Cir. 1984); *United States* v. *Sun Myung Moon*, 718 F.2d 1210, 1237 (2d Cir. 1983), cert. denied, No. 83-1242 (May 14, 1984); *United States* v. *Bridges*, 717 F.2d 1444, 1448 & n.18 (D.C. Cir. 1983), cert. denied, No. 83-6062 (Feb. 21, 1984); *United States* v. *Armilio*, 705 F.2d 939, 941 (8th Cir. 1983), cert. denied, No. 83-55 (Oct. 11, 1983); *United States* v. *Molinares*, 700 F.2d 647, 653 (11th Cir. 1983); *United States* v. *Martellano*, 675 F.2d 940, 942 (7th Cir. 1982); *United States* v. *Thompson*, 637 F.2d 267, 268 (5th Cir. 1981); *United States* v. *Baptiste*, 608 F.2d 666, 668 (5th Cir. 1979), cert. denied, 450 U.S. 1000 (1981).

petitioner's contention. Moreover, this Court has previously declined to grant review in cases that raised the identical issue under Section 1623 and relied on the same arguments and authorities that petitioner advances.[13] Petitioner has cited no recent developments nor offered any other reason to show that certiorari is more appropriate in this case than in the prior cases in which the Court has denied the petitions, and accordingly further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

CHARLES FRIED
Acting Solicitor General

STEPHEN S. TROTT
Assistant Attorney Geneal

VINCENT L. GAMBALE
Attorney

AUGUST 1985

---

[13]See *Armilio* and *Baptiste, supra*; *Falco* v. *United States*, No. 82-882, cert. denied, 460 U.S. 1068 (1983). We are sending copies of our briefs in opposition in *Armilio* and *Falco* to counsel for petitioner. (The government waived its right to file a brief in opposition in *Baptiste*.)

DOJ-1985-08